No. 05-1345

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

QUESTION PRESENTED

This Court held in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386 (1994), that "a so-called flow control ordinance, which require[d] all solid waste to be processed at a designated transfer station before leaving the municipality," discriminated against interstate commerce and was invalid under the Commerce Clause because it "de-priv[ed] competitors, including out-of-state firms, of access to a local market." This case presents two questions:

1. Whether the virtually *per se* prohibition against "hoard[ing] solid waste" (*id.* at 392) recognized in *Carbone* is inapplicable when the "preferred processing facility" (*ibid.*) is owned by a public entity.

2. Whether, even if viewed as non-discriminatory, the flow-control ordinances at issue here violate the Commerce Clause under the test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

RULE 29.6 STATEMENT

None of petitioners has a parent company and no publicly held company owns 10% or more of the stock of any of the petitioners.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Constitution and Statutes:

Miscellaneous:

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals are reported at 261 F.3d 245 ("*United Haulers I*") (Pet. App. 22a-53a) and 438 F.3d 150 ("*United Haulers II*") (Pet. App. 1a-21a). The decisions of the United States District Court for the Northern District of New York initially granting summary judgment in favor of plaintiffs (Pet. App. 103a-117a) and, following remand, granting summary judgment in favor of defendants (Pet. App. 54a-74a) are unreported. The Report and Recommendation of the United States Magistrate Judge (Pet. App. 75a-102a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on February 16, 2006. A timely petition for certiorari was filed on April 1, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2(d) of Oneida County Board of Legislators Resolution No. 301 provides in relevant part:

> From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County, or by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority.

Resolution No. 301 is set forth in full at Pet. App. 118a-130a.

Section 2(c) of Herkimer County Local Law, Introductory No. 1 - 1990, provides in relevant part:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County.

Herkimer County Local Law, Introductory No. 1 - 1990, is set forth in full at Pet. App. 131a-143a.

Article I, Section 8 of the U.S. Constitution provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

STATEMENT

In *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), this Court held that a local ordinance that required all municipal solid waste within the town to be delivered to a transfer station that was built by a private company at the town's instigation and that was to be sold to the town for one dollar after five years violated the Commerce Clause. The facts of the present case are virtually identical, except that the facilities designated to receive waste have been owned from day one by a public entity.

The court of appeals concluded that this distinction made a dispositive difference. It held that there can be no discrimination against interstate commerce when the favored business is publicly owned. Accordingly, it ruled that the flow-control laws were not subject to the "virtually *per se* rule of invalidity" applicable to discriminatory regulations (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)), but instead should be evaluated under the balancing test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under the *Pike* test, an evenhanded regulation "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. On appeal after remand, the court of appeals adopted an idiosyncratic understanding of the *Pike* test, ruling that, because the costs of the flow-control laws "do[] not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (Pet. App. 15a-16a), they imposed, at most, an "insubstantial" burden on interstate commerce (*id.* at 18a) that was easily outweighed by the ostensible benefits of the provisions.

These holdings threaten to render *Carbone* a dead letter, because it is a simple matter for municipalities to structure (or restructure) transactions so that they have record title to the preferred facilities.

The pertinent facts are simple and undisputed.

1. *Waste Collection in Oneida and Herkimer Counties*. Oneida and Herkimer Counties are sparsely populated counties in upstate New York. Historically, collection of trash has been a ***private*** function in these counties. Most local governments in Oneida and Herkimer Counties have never assumed responsibility for trash collection, and residents and businesses in most parts of the Counties must contract with private haulers for the removal of their waste. See J.A. 197a.

2. *The Imposition of Flow Control in Oneida and Herkimer Counties*. In September 1988, at the request of Oneida and Herkimer Counties, the New York State Legislature created the Oneida-Herkimer Solid Waste Management Authority ("the Authority"). Pet. App. 57a-58a, 78a. In May and December 1989, the Authority entered into contracts with the Counties that required the Authority to purchase, operate, construct, and develop facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties. For their part, the Counties agreed to ensure the

delivery of all solid waste generated within their borders to facilities designated by the Authority. *Id*. at 58a, 79a.

In December 1989, Oneida County passed the required flow-control ordinance. The ordinance specifies that all solid waste and recyclables left at curbside must "be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority * * *." Pet. App. 122a. Under the ordinance, any hauler handling waste generated in the County must have a valid permit issued by the County or the Authority (*id*. at 127a) and must deliver all construction debris, green waste, commercial and industrial waste, curbside recyclables, major appliances and tires, household hazardous waste, and infectious waste to designated facilities (*id*. at 122a, 124a-127a). Penalties for noncompliance include permit revocation, fines, and imprisonment. *Id.* at 129a-130a. Herkimer County enacted an almost identical flow-control ordinance in February 1990. *Id.* at 131a-143a.

The Authority's Solid Waste Plan expressly contemplates "the development of a new long-term landfill site to accommodate the non recyclable portion of the waste stream" of the two Counties. J.A. 166a. Pending development of its own landfill, however, the Authority needed to construct a local transfer station to store, transfer, and consolidate municipal solid waste. In June 1991, the Authority contracted with a private entity (Empire Sanitary Landfill of Taylor, Pennsylvania ("Empire")) for the design, construction, and operation of a transfer station in Utica, Oneida County, with subsequent disposal of the waste in Empire's landfill in Pennsylvania. Pet. App. 27a-28a.[1] The contract required the

[1] After the agreement with Empire expired in 1998, Waste Management of New York was selected to operate the transfer station. See J.A. 176a-190a. Under that contract, waste is transported to a landfill in Fairport, New York. See *id.* at 177a.

Authority to divert all solid waste generated in the Counties (except recyclables and waste burned at the Authority's incinerator) to the Utica Transfer Station. J.A. 74a, 85a. Consistent with this agreement, the Authority's Rules and Regulations expressly require haulers to "deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." Pet App.28a; J.A.277a.

When this action commenced in 1995, the Authority had designated five Authority-owned facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties—an incinerator, a recycling center, an ash landfill, a green waste compost facility, and the Utica Transfer Station. J.A. 285a-286a.[2] At that time, the monopolistic tipping fee at the transfer station was $86 per ton. Pet. App. 107a; J.A. 282a. As the Second Circuit recognized, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." Pet. App. 29a. Indeed, petitioners submitted evidence that, if permitted to do so, they could dispose of waste they collect in Oneida and Herkimer Counties at out-of-state facilities for as little as $26 per ton. J.A. 292a, 294a; see also *id.* at 257a, 267a-268a ($37 per ton to $55 per ton, including transportation); *id.* at 272a ($39.20 per ton, including transportation, for construction and demolition waste).

The flow-control provisions direct more than 200,000 tons of solid waste per year to the County-designated facilities (J.A. 197a), generating revenues of more than $16 million for the Authority annually. See *id.* at 174a.

---

[2] Subsequently, the Authority designated two additional transfer stations, a stump disposal facility, and a household hazardous waste facility. See J.A. 175a.

3. *The Complaint and the Initial Grant of Summary Judgment to Plaintiffs.* In April 1995, petitioners—six haulers that operated in Oneida and Herkimer Counties and a trade association—filed suit against the Authority and both Counties, alleging that the flow-control ordinances and the Authority's Rules and Regulations (collectively "the flow-control laws") violate the dormant Commerce Clause and that, in enforcing those laws, defendants deprived them of their constitutional rights in violation of 42 U.S.C. § 1983. On March 31, 2000, the district court granted plaintiffs' motion for summary judgment, concluding that the flow-control laws violated the dormant Commerce Clause.

The district court found the unconstitutionality of the flow-control laws to be conclusively established by *Carbone*. It explained:

> These flow control laws are virtually indistinguishable from the laws examined and struck down in both *Carbone* and *SSC Corp.* [*v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995)]. * * * Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. * * * I accordingly conclude that the flow control laws in Oneida and Herkimer counties also violate the dormant commerce clause. The laws are discriminatory and *per se* invalid.

Pet. App. 111a.

The court rejected defendants' contention that the challenged laws could be distinguished on the ground that they constitute "an inextricable part of a public waste management system for the local management of local waste," stating: "[T]he relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes." *Id*. at 113a. And in response to defendants' argument that "they merely have restructured the private collection market and prohibited haulers from crossing over into the disposal market," the district court explained:

> [T]he flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with respect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility.

Id. at 113a-114a.

Having found the flow-control laws unconstitutional, the district court enjoined their enforcement and referred the matter to the magistrate judge for determination of damages. *Id*. at 116a-117a. Defendants appealed under 28 U.S.C. § 1292(a)(1).

4. *The First Appeal: United Haulers I.* The Second Circuit reversed. It concluded that "the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility" (Pet. App. 39a) and held that "a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities" (*id*. at 40a).

The court professed uncertainty as to whether this Court had accepted or rejected the "public-private distinction" in *Carbone*, stating that the majority's "language can fairly be described as elusive on that point." Pet. App. 45a. But it found "precedential support" (*id.* at 50a) for such a distinction in the "local processing cases" upon which the Court relied in *Carbone*. Noting that in each case the favored businesses were private entities (*id.* at 45a), it reasoned that "[t]he common thread in the Court's dormant Commerce Clause jurisprudence * * * is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition" (*id*. at 47a (emphasis in original)). Relying on Justice Souter's dissent in *Carbone*, the court found there to be "sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities," namely that "'[r]easons other than economic protectionism are * * * more likely to explain the design and effect of an ordinance that favors a public facility.'" *Ibid*. (quoting *Carbone*, 511 U.S. at 421 (Souter, J., dissenting)).

The Second Circuit accordingly held that the district court erred in applying the strict level of scrutiny applicable to discriminatory legislation and instead should have applied the more lenient balancing test articulated in *Pike.* Although admitting that it was tempted to apply *Pike* itself (and presumably uphold the laws under it), the court satisfied itself with remanding the case to the district court with a very strong hint as to how to rule. See Pet. App. 52a. The plaintiffs filed a petition for a writ of certiorari, which was denied. 534 U.S. 1082 (2002).

5. *District Court Proceedings on Remand.* Upon remand, the parties conducted discovery and then filed cross-motions for summary judgment. Dkt. Nos. 145, 152, 160. The magistrate judge recommended granting summary judgment in favor of defendants. Pet. App. 101a-102a.

According to the Report and Recommendation of the magistrate judge, the flow-control laws do not impose ***any*** burden on interstate commerce that is cognizable under the *Pike* test. Pet. App. 99a. In the view of the magistrate judge, "[t]he critical inquiry" under *Pike* "is whether an out-of-state business is treated less favorably than one similarly situated but within the state." *Id.* at 95a. Because the Counties' flow-control laws treat "a local private trash business * * * no differently * * * than one situated out of state" (*id.* at 96a), the magistrate judge concluded that there was no need to "proceed to the next step of balancing the burdens against the putative benefits associated with the legislation." *Id.* at 99a.

Over plaintiffs' objections, the district court adopted the Report and Recommendation in its entirety. Pet. App. 74a. The district court stated:

> [P]laintiffs here have not and cannot identify "**any** in-state commercial interest that is favored, directly or indirectly," by the waste management legislation enacted by defendants at the expense of out-of-state competitors. In the absence of evidence that the flow control laws impacted interstate commerce differently than intrastate commerce, there were no detrimental "effects" to weigh against the putative benefits of the legislation. Thus, it was not error, as plaintiffs contend, for the Magistrate Judge to decline to engage in the second part of the *Pike* balancing test by weighing non-existent burdens against obvious benefits.

Id. at 70a (emphasis in original; citations omitted); see also *id.* at 67a (there could be no violation of the Commerce Clause where there was "no distinction in the treatment of in-state versus out-of-state businesses"). The district court dismissed the complaint, and plaintiffs appealed.

6. *The Second Appeal: United Haulers II.* The Second Circuit affirmed. The court acknowledged that the Authority had "employed its regulatory powers to compel delivery of the waste generated within the Counties to its processing facility." Pet. App. 12a. The court further recognized that the regulations "impose a type of export barrier on the Counties' unprocessed waste" in that they have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing intrastate and interstate lines." *Id.* at 13a. Thus, the court conceded, the Counties' flow-control laws have "removed the waste generated in Oneida and Herkimer Counties from the national market-

place for waste processing services, a result which traditionally has been thought to implicate a central purpose of the Commerce Clause." *Id.* at 15a.

The court was reluctant, however, to conclude that this trade barrier imposed "a differential burden triggering the need for *Pike* analysis." Pet. App. 16a. It explained: "[W]e think the courts have safeguarded the ability of commercial goods to cross state lines primarily as a means to protect the right of businesses to compete on equal footing wherever they choose to operate" and to enable "states and municipalities to exercise their police powers without undue interference from the laws of neighboring jurisdictions." *Id.* at 18a. Because the Counties' waste export ban did not, in its view, implicate these concerns, the court found it to be unclear whether the flow-control laws imposed ***any*** cognizable burden on interstate commerce.

The court ultimately declined to decide whether the flow-control laws impose a burden cognizable under *Pike*. Pet. App. 16a. Instead, it held that any such burden was so "insubstantial" or "slight" (*id.* at 18a) that it would be outweighed by even a "minimal showing of local benefit" (*ibid.*). But the court made clear that, in assessing the "*degree* to which [the provisions] might burden interstate commerce" (*ibid.* (emphasis in original)), it found it "critical" (*ibid.*) that "the purported differential burden does not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (*id.* at 15a-16a). Concluding that the benefits of the flow-control laws "easily clear" the low hurdle it had just established for them, the court held that the provisions satisfy the *Pike* test. *Id.* at 18a.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Carbone*, this Court recognized that flow-control provisions erect overt barriers to interstate trade that implicate the core purposes of the dormant Commerce Clause, and, accordingly, ruled that such measures are subject to the most stringent level of scrutiny. The Second Circuit now has held that, when public entities hold title to the designated facilities, flow-control provisions are not subject to virtually *per se* invalidation but instead impose such an "insubstantial" burden on interstate commerce that they will be upheld upon even a "minimal" showing of local benefit.

Under the long-established principles that underlie *Carbone*, however, the flow-control provisions at issue here violate the Commerce Clause. This Court held in *Carbone* that Clarkstown's virtually identical flow-control ordinance discriminated against interstate commerce because, like other local processing requirements that the Court has invalidated, it hoarded demand for the benefit of an in-state facility and precluded out-of-state competition. The ordinances here have precisely the same protectionist effect: They force commercial haulers to purchase waste processing and disposal services from in-state facilities, barring patronage of out-of-state facilities that offer those services at lower prices.

Like the ordinance in *Carbone*, moreover, the flow-control measures here are principally a financing mechanism: They allow respondents to use monopolistic tipping fees, rather than tax dollars, to fund their facilities. Because respondents can advance their financial and other goals without erecting regulatory barriers to interstate trade, the flow-control measures fail strict scrutiny.

The Second Circuit's view that flow-control provisions are exempt from strict scrutiny when they favor publicly owned facilities is irreconcilable with *Carbone*. Clarkstown's transfer station was public in all but the most formal sense; the flow-control ordinance served the public purpose of allowing the Town to obtain title to the facility at nominal cost without investing tax dollars. While fully aware of those facts, the Court decided that the flow-control provision impermissibly discriminated against interstate commerce—implicitly rejecting Justice Souter's dissenting view that the facility's public character precluded a finding of discrimination. Given this Court's renunciation of formalistic distinctions in its Commerce Clause decisions, it is implausible that it would have decided the case differently had Clarkstown already held title to its transfer station.

In fact, the public-private distinction adopted below rests on an overly narrow understanding of the forms of discrimination that trigger strict scrutiny. In the Second Circuit's view, respondents' ordinances do not discriminate because they do not give in-state private industry an advantage over out-of-state competitors. But this Court has frequently held that state and local laws are protectionist for other reasons—when, for example, they require the local performance of operations that could be performed elsewhere, prevent out-of-state sellers from competing for in-state business, or hoard articles of commerce for the benefit of state residents.

The flow-control ordinances here possess all of these protectionist characteristics. Contrary to the Second Circuit's view, moreover, they clearly benefit a local proprietor—*i.e.*, respondents themselves, who should not be allowed to use their regulatory powers to shield their market activities from interstate competition.

Because the flow-control provisions represent classic protectionism, they should be subject to strict scrutiny. But even if the public ownership of the designated facilities renders the ordinances non-discriminatory, they nonetheless should be held invalid under the *Pike* test. As the Second Circuit acknowledged, the flow-control measures have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing * * * interstate lines." Pet. App. at 13a. The provisions thus impose a severe burden on interstate commerce that is clearly excessive in comparison to the interests that they serve.

Indeed, as Justice O'Connor observed in *Carbone*, the widespread adoption of similar measures by other localities would destroy the vibrant interstate waste market and lead to Balkanization of the sort that the Founders intended to avoid. Because the flow-control ordinances are clearly unconstitutional, the decision below should be reversed.

ARGUMENT

I. THE FLOW-CONTROL PROVISIONS DISCRIMINATE AGAINST INTERSTATE COMMERCE AND CANNOT SURVIVE THE STRICT SCRUTINY APPLICABLE TO DISCRIMINATORY REGULATIONS

A. The Flow-Control Provisions Fail Under The Reasoning Of *Carbone*.

In *Carbone,* this Court held that "well-settled principles of our Commerce Clause jurisprudence" required invalidation of a flow-control ordinance adopted by the Town of Clarkstown. 511 U.S. at 386. *Carbone* was one of a long line of decisions holding that the Commerce Clause protects interstate commerce in waste from state or local restriction. See *City of Philadelphia*, 437 U.S. 617; *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Res.,* 504 U.S. 353 (1992); *Oregon Waste Sys., Inc. v. Dept. of Envt'l Quality*, 511 U.S. 93 (1994). The bedrock principles underlying *Carbone* compel the conclusion that respondents' flow-control ordinances are unconstitutional.

Clarkstown's ordinance required that all solid waste generated within the town's borders be brought for processing to the transfer station designated by the town. The transfer station was constructed by a private entity, which, by agreement with the town, was to operate the facility for five years, whereupon the town was to purchase the facility for one dollar. 511 U.S. at 387. The town guaranteed that the facility would receive a minimum of 120,000 tons of waste annually and authorized the contractor to charge a tipping fee of $81 per ton, a rate that exceeded the market rate. *Ibid*. "The object of this arrangement was to amortize the cost of the transfer station: The town would finance its new facility with the income generated by the tipping fees." *Ibid*.

This Court held that, because the ordinance "depriv[es] competitors, including out-of-state firms, of access to a local market, * * * the flow control ordinance violates the Commerce Clause." *Id*. at 386. The Court pointed out that "what makes garbage a profitable business is not its own worth but the fact that the possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Id*. at 390-391. "With respect to this stream of commerce, the flow control ordinance discriminates," the Court explained, "for it allows only the favored operator to process waste that is within the limits of the town." *Id*. at 391.

The Court's reasoning was firmly and explicitly rooted in its prior Commerce Clause decisions. First, the Court explained that the challenged flow-control ordinance was "just one more instance of local processing requirements that we long have held invalid." *Ibid.* It stated:

> The essential vice in laws of this sort is that they bar the import of the processing service. * * * The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. * * * The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 392.

Second, the Court found the ordinance to be "not far different from" (*id.* at 394) the state law invalidated in *Buck v. Kuykendall*, 267 U.S. 307 (1925). That law prohibited common carriers from operating on interstate routes without a certificate of public necessity and convenience; such a certificate had been denied to the petitioner on the ground that other carriers adequately served the routes in question. Because the provision constituted a "prohibition of competition" in interstate commerce (*Buck*, 267 U.S. at 315 (quoted in *Carbone*, 511 U.S. at 394)), the Court concluded that it was unconstitutional. The Court stated: "Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause." *Buck*, 267 U.S. at 316.

Having found that Clarkstown's ordinance discriminated against interstate commerce, the Court next examined whether the provision could satisfy the stringent standard applicable to discriminatory measures. The Court explained that the flow-control ordinance would be upheld only if it was among "the narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate state interest." 511 U.S. at 392. The Court noted that Clarkstown's attempts to satisfy that demanding standard "must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." *Id.* at 393 (emphasis added).

The Court then rejected the argument that flow control is "necessary to ensure the safe handling and proper treatment of solid waste." *Id.* at 392-93. It explained that "Clarkstown has any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question." *Id.* at 393. Among other things, "uniform safety regulations enacted without the object to discriminate" could be used to "ensure that competitors like Carbone do not underprice the market by cutting corners on environmental safety." *Ibid.*

The Court next rejected the notion that Clarkstown could "justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment." *Ibid.* According to the Court, "States and localities may not attach restrictions on imports or exports in order to control commerce in other States." *Ibid.*

The Court acknowledged that the flow-control ordinance did serve one "central purpose that a nonprotectionist regulation would not: It ensures that the town-sponsored facility will be profitable, so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years." *Ibid.* But, the Court explained, "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Ibid.* In response to Clarkstown's argument that "special financing is necessary to ensure the long-term survival of the designated facility" (*id.* at 594), the Court stated:

> [T]he town may subsidize the facility through general taxes or municipal bonds. ***But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.***

Ibid. (emphasis added; citation omitted).

Like the Town of Clarkstown, respondents here are using their regulatory powers to discriminate against interstate commerce: they are forcing waste haulers that might otherwise do business with out-of-state entities to purchase waste processing and disposal services from an in-state facility. Under *Carbone*, this scheme is unconstitutional.

In fact, the flow-control provisions at issue here—which are virtually identical to the ordinance invalidated in *Carbone*—suffer from exactly the same "essential vice[s]" as Clarkstown's ordinance. *Id.* at 392. First, the ordinances "hoard[] solid waste, and the demand to get rid of it, for the benefit of the preferred facility." *Ibid.* Absent the flow-control provisions, demand for disposal of waste generated in Oneida and Herkimer could contribute to the economic viability of facilities elsewhere. Instead, as in *Carbone*, municipal authorities are using their regulatory power to monopolize that limited resource for the in-state facilities that they sponsor.

Second, the flow-control provisions "squelch[] competition" by out-of-state facilities. *Ibid.* As in *Carbone*, out-of-state firms are precluded by law from competing for the business of commercial waste haulers that have picked up waste from Clarkstown's residents and businesses. Thus, respondents are doing exactly what this Court has said is forbidden: "us[ing] their regulatory power to favor a local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Id.* at 394.[3]

As in *Carbone*, moreover, the flow-control provisions cannot be justified by the local interests they ostensibly serve. As the court of appeals explained, the principal purpose of the measures is to "secure the financial viability of the Counties' comprehensive waste management program by ensuring that sufficient waste (with its attendant 'tipping fees') is delivered to the Authorities' facilities." Pet. App. 18a-19a. Even before the flow-control provisions were adopted, proponents acknowledged that "a specific objective was to alleviate the County tax burden" (J.A. 307a) and that

---

[3] A few differences in the ordinances deserve mention. Unlike the Counties' ordinances, Clarkstown's ordinance required waste processed within the Town but generated elsewhere to be delivered to the Town's transfer station. That feature of the ordinance, however, was not indispensable to the majority's decision that the provision discriminated against interstate commerce. In other respects, moreover, respondents' ordinances impose ***greater*** burdens on interstate commerce than Clarkstown's ordinance: Haulers are not permitted (as Carbone was) to sell residential recyclables in interstate commerce (J.A. 96a-97a) and respondents' facilities do not accept out-of-state waste (*id.* at 136a).

"[t]he ability to finance and then operate [the Authority] facilities depends upon the legal commitment of the [Counties'] waste." *Id.* at 311a. Respondents' expert confirmed that "[b]ecause of flow control it is possible for the Authority * * * to impose a fee which is above the marginal cost of disposal," generating "funds that can be utilized to carry out some of the other aspects of the integrated waste management program." Joint Appendix in *United Haulers II*, at A-788.

As the court of appeals acknowledged, however, "revenue generation is not a local interest that can justify discrimination against interstate commerce." Pet. App. 19a (quoting *Carbone*, 511 U.S. at 593). That is a sensible rule because local governments have available many nondiscriminatory methods to finance their activities. Moreover, flow control is a very inefficient financing mechanism: Although flow control allows municipalities to avoid the "political cost" of "making the citizenry explicitly aware of the high cost" of local facilities (RICHARD C. PORTER, THE ECONOMICS OF WASTE 112 (2002)), flow control actually is very costly because it prevents local residents and businesses from seeking less expensive disposal alternatives. Even if local taxes must be increased to support local facilities in the absence of flow control, "the city's residents gain more on the waste disposal side * * * than they lose as city taxpayers." *Id.* at 111.

The court of appeals opined that the flow control measures also serve to encourage recycling and waste volume reduction through differential pricing. Pet. App. 20a. It was undisputed, however, that many municipalities have been equally or more successful in encouraging recycling without using flow control. J.A. 226a, 345a-346a. Even if they could no longer charge monopolistic prices, moreover, respondents could continue to employ differential pricing at their facilities.

Finally, the court of appeals contended that flow control was necessary in order to "direct[] the region's trash to landfill facilities that employ acceptable environmental practices"—thereby "reducing the Counties' exposure to costly environmental tort suits." Pet. App. 20a. This putative justification for flow control is misguided. If a commercial hauler were to pick up waste from a business or residence and then bring it to a processing or disposal facility unconnected with the Counties, respondents never would come into possession of the waste and would not have any liability for it. See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) ("a municipality may be liable" for environmental cleanup "if it arranges for the disposal of hazardous substances"). Indeed, if respondents genuinely wanted to minimize exposure to environmental liability, it would be more rational for them to ***encourage*** the use of private waste disposal alternatives. This ostensible rationale for flow control, therefore, simply cannot justify discrimination against interstate commerce.

B. The Public-Private Distinction Adopted By The Court Of Appeals Is Irreconcilable With This Court's Decisions.

The Second Circuit acknowledged that the flow-control ordinances have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing intrastate and interstate lines." Pet. App. 13a. Distinguishing this case from *Carbone*, the court of appeals nevertheless held that "a municipal flow control ordinance does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly-owned facilities." *Id.* at 40a. As we next discuss, however, the public character of the Counties' facilities is a wholly invalid basis for permitting this acknowledged "export barrier" (*id.* at 13a) to be erected by a local government.

1. In *Carbone*, the Court implicitly rejected the public-private distinction.

The court of appeals believed that *Carbone* left open the question whether flow control favoring a publicly owned facility is permissible. In fact, the majority in *Carbone* invalidated Clarkstown's ordinance while fully aware that the designated facility was essentially public, employing reasoning that was fully applicable to public facilities. Accordingly, the opinion implicitly rejects the distinction relied upon by the court of appeals.

The Court clearly understood that Clarkstown's transfer facility was public in character. As the majority opinion explains, the facility was conceived and constructed under the imprimatur of the municipality: Clarkstown had agreed to close its existing public landfill and build a transfer station on the same site pursuant to a consent decree with the New York State Department of Environmental Conservation. *Carbone*, 511 U.S. at 386-387. Although "a local private contractor agreed to construct the facility and operate it for five years" (*ibid.*), it was understood that after five years the facility would transfer ownership to the town for one dollar. The ordinance itself referred to the facility as though it were already public: It stated that all acceptable waste "is to be transported and delivered to the Town of Clarkstown solid waste facility * * * or to such ***other disposal or recycling facilities operated by the Town of Clarkstown.***" *Id.* at 398 (emphasis added).

Further, the Court understood that the flow-control provision was principally a ***public*** "financing measure": the provision was designed to "ensure[] that the town-sponsored facility will be profitable so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years." *Id.* at 393. Given these circumstances, it is no wonder that the majority referred to the transfer station as ***the town's*** project. See *id.* at 394 ("[H]aving elected to use the open market to earn revenues for ***its*** project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of state.") (emphasis added); *id.* at 387 ("The town would finance ***its*** new facility with the income generated by the tipping fees.") (emphasis added).

This language leaves no doubt that the majority viewed the facility as a creature of the town, created and operated in the service of the town's interests. It found the flow-control ordinance to be discriminatory anyway, rejecting Clarkstown's argument that the ordinance was not discriminatory because "the Town is not a 'competitor' receiving an 'advantage'" over out-of-state interests. Brief for Respondents in *C&A Carbone, Inc. v. Town of Clarkstown* (No. 92-1402), 1993 WL 433043, at *13.

The majority issued its decision over a dissent in which Justice Souter (joined by Chief Justice Rehnquist and Justice Blackmun) cited the facility's public character as grounds for upholding the ordinance. In Justice Souter's opinion, there was no discrimination because ***"the one proprietor * * * favored [by the challenged flow control ordinance] is essentially an agent of the municipal government*** * * *." 511 U.S. at 416. The dissenters believed that "[a]ny discrimination worked by [the ordinance] thus fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist." *Ibid*. (emphasis added). The dissenters further explained:

> While our previous local processing cases have barred discrimination in markets served by private companies, ***Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership***. * * * The majority ignores this distinction between public and private enterprise, equating [the ordinance's] "hoard[ing]"

> of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms.

Id. at 419-420 (emphasis added; internal quotation marks, citations, and footnote omitted).

The dissenters concluded that the ordinance should be upheld because it "conveys a privilege ***on the municipal government alone***, the only market participant that bears responsibility for ensuring that adequate trash processing services continue to be available to Clarkstown residents." *Id*. at 430 (emphasis added). In departing from this vigorously argued dissent, the majority implicitly rejected the theory that flow-control measures benefiting public facilities are permissible.

In embracing the public-private distinction, the Second Circuit took the position that "the Justices were divided over *the fact of whether* the favored facility was public or private, rather than on the import of that distinction." Pet. App. 44a (emphasis in original). But neither the majority nor the dissenting opinion in *Carbone* (nor Justice O'Connor's concurring opinion, for that matter) contains any hint of such a factual dispute. To the contrary, as discussed above, the majority evidently accepted the dissent's view that, for all practical purposes, the transfer station was "essentially a municipal facility" (511 U.S. at 419)—just like the facilities that benefit from flow control here. That uncontroverted fact did not change the Court's view that the monopoly afforded to the transfer station by the town's regulation was unconstitutional.

Defending its conclusion that the majority was swayed by the ostensibly private nature of Clarkstown's transfer station, the court of appeals noted that "the *Carbone* majority referenced the private character of the favored facilities several times." Pet. App. 44a. In fact, the three cited references do not have the significance that the lower court attributes to them. In the first one, the Court simply recited the undisputed fact that "[a] local private contractor agreed to construct the facility and operate it for five years." 511 U.S. at 387. In the second and third passages cited by the court of appeals, the Court explained that Clarkstown's ordinance favored a "single local proprietor" (*id.* at 392) and thus gave that proprietor "an advantage over rival businesses" (*id.* at 394). But a governmental entity can be a "local proprietor" every bit as much as a private one.[4]

Indeed, as discussed above, the core reasoning of the Court's opinion applies fully whether the government or a private entity owns and/or operates the preferred facility. As the Court observed:

> The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.

Id. at 390. Regardless of who owns the preferred facility, a flow-control law, by "allow[ing] only the favored operator to process waste that is within the limits of the town," constitutes "economic protectionism" and threatens to result in "retaliatory measures." See *id.* at 391.[5]

---

4 As we discuss further below (at pages 33-37), this Court has long understood that state and local governments may enter into the marketplace and compete with other businesses. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). When they do so, they are free to function as other businesses do, but may not use their regulatory powers to discriminate against interstate commerce. See *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

5 For example, if a private interstate disposal facility sees its volumes reduced as a result of flow control, its only option might

In *National Solid Waste Management Association v. Daviess County*, 434 F.3d 898 (6th Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3106 (June 28, 2006) (No. 06-359), the Sixth Circuit reached this same conclusion. In *Daviess*, the court assessed the constitutionality of a flow-control provision requiring all waste generated within Daviess County, Kentucky, to be deposited at facilities owned by the County. Applying *Carbone*, the court found there to be "little doubt" that the provision "discriminates against interstate commerce." *Id.* at 905. "By forcing [plaintiffs] to use Defendant's disposal and transfer facilities," the court held, "the Ordinance would prohibit these members from using other in-state and out-of-state facilities" and hence was "facially discriminatory against out-of-state interests." *Ibid.*

The Sixth Circuit "respectfully disagreed" with the Second Circuit's view that the public-private distinction could be squared with *Carbone.* It pointed out that this Court's focus in *Carbone* "was on the harm to out-of-state businesses and the local market, as opposed to the benefit conferred to the local provider." *Id.* at 910-911. As the court observed, "this harm would occur regardless of who owned the benefited facility." *Id.* at 911. The Sixth Circuit further noted that Clarkstown's transfer station was "quite clearly owned in fact

---

be to transfer title to a local county waste authority in exchange for the locality's enactment of a provision requiring that all local waste be transported to that facility. There can be no doubt that the Commerce Clause was included in the Constitution to prevent just this sort of restriction on interstate trade. See *State of Minnesota v. Barber*, 136 U.S. 313, 321 (1890) ("the enactment of a similar statute by each one of the states composing the Union would result in the destruction of commerce among the several states").

by the municipality" (*id*. at 912)[6]—compelling the conclusion that this Court, in striking down Clarkstown's flow-control ordinance, had "implicitly rejected the public-private distinction." *Ibid.*

In the end, the only difference between Clarkstown's facility and respondents' facilities is that respondents hold title to their facilities already, whereas Clarkstown had a contractual right to obtain title to its transfer station, at nominal cost, after several years. Nothing in *Carbone* suggests that this one fact made a dispositive difference—or indeed any difference—to the majority's decision. If the Court had intended its holding to preclude the flow-control ordinance only for the few months until the town was to receive record title to the facility (an event which has since occurred), it surely would have said so.

Indeed, the public-private distinction is irreconcilable with this Court's renunciation of the use of formalistic distinctions in resolving Commerce Clause challenges. Under the Second Circuit's decision, the validity of flow control turns entirely on the identity of the record title owner of the preferred facility. If legal title to a facility is in the name of a private entity, a law requiring that waste be delivered to that facility is subject to the Court's virtually *per se* rule of invalidity. If legal title to a facility is in the name of a public entity—even if constructed and operated by a private entity—the very same law would be evaluated under the more deferential *Pike* test (which, as construed by the Second Circuit at least, can never really be violated when the facility is pub-

---

[6] The Sixth Circuit further explained: "At most, the private contractor was an agent of the town, collecting tipping fees on behalf of the town and then applying these fees to the construction costs that were not directly charged to the town because of the agreement." *Daviess*, 434 F.3d at 912.

licly owned). The effect of the law on interstate commerce is precisely the same, yet the result couldn't be more different.

The Second Circuit's decision, in short, exalts form over substance. In so doing, it deviates markedly from this Court's modern Commerce Clause jurisprudence, which has steadfastly "eschewed formalism" in favor of "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994); see also *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("[w]e seek to avoid formalism and to rely upon a consistent and rational method of inquiry") (internal quotation marks omitted). For example, during the middle part of the twentieth century, the Court drew a distinction between taxes on the privilege of engaging in interstate commerce and taxes on the privilege of using a state's highways, holding the former unconstitutional and the latter permissible. Later, however, the Court renounced this distinction as "a triumph of formalism over substance" (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977)) that "allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology'" (*Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto*, 430 U.S. at 281)).

The public-private distinction embraced by the Second Circuit is a throwback to the formalism that this Court has renounced. The appropriate focus is, instead, "whether the [challenged law] produces a forbidden effect" (*Complete Auto*, 430 U.S. at 288). Because the flow-control provisions here clearly produce the same "forbidden effect" as the ordinance invalidated in *Carbone*, they should suffer the same fate.

2. The public-private distinction rests on an overly narrow reading of this Court's prior Commerce Clause decisions.

In carving out its "public facilities" exception to *Carbone*, the Second Circuit relied principally on a narrow reading of the "local processing cases" cited in *Carbone*. The court of appeals asserted that the laws challenged in these cases each "favored a local private business, industry or investment (not a state-owned facility or a public monopoly) to the detriment of out-of-state competitors." Pet. App. 45a. In its view, the concerns animating these cases disappear when the favored facility is owned by a public entity. *Id.* at 46a-48a.

In fact, the concerns underlying the "local processing" and other cases cited in *Carbone* extend well beyond the preferential treatment of in-state businesses over out-of-state competitors. These cases make clear that discrimination is present whenever parochial state measures restrict the flow of commerce across state lines—whether by requiring operations to be performed in-state rather than elsewhere, by restraining interstate competition for the in-state market, or by monopolizing the state's resources for its own citizens.

"The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976). Flow-control measures that impose regulatory barriers to the exportation of waste squarely implicate these concerns whether title to the preferred facility is owned by a private entity or a public one.

a. Local processing requirements (export restrictions)

In *Toomer v. Witsell*, 334 U.S. 385 (1948), and *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984)—both cited in *Carbone*—the Court invalidated laws requiring the local performance of operations that could otherwise be performed out of state.

In *Toomer*, the challenged provision required boats licensed to trawl for shrimp in South Carolina to dock at a South Carolina port and unload, pack, and stamp their catch before shipping or transporting it out of state. 334 U.S. at 391. As the Court explained, "an inevitable concomitant of a statute requiring that work be done in South Carolina * * * is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry." *Id.* at 403-404. That observation would have been equally apt—and the Commerce Clause violation equally serious—had the in-state ports and packing facilities been owned by the state.

In *Wunnicke*, an Alaska statute required timber taken from local land to be processed within the State before it could be exported. Because this amounted to "a naked restraint on export of unprocessed logs," the Court found there to be "little question that the processing requirement cannot survive scrutiny under the precedents of the Court." 467 U.S. at 99. The Court found support in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in which it noted that it had "'viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere.'" *Wunnicke*, 467 U.S. at 100 (quoting *Pike*, 397 U.S. at 145). As the Court stated, "[e]ven where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been held to be virtually *per se* illegal." *Ibid.* (citation omitted).

The teachings of *Toomer* and *Wunnicke* apply squarely here. Just like the provisions that troubled the Court in those cases, the requirement that waste be transported to respondents' facilities keeps within the State money (tipping fees) and jobs (for workers at those facilities) that might otherwise leave the state if the work could be performed more efficiently elsewhere. The flow-control provisions also constitute "a naked restraint of export of unprocessed" waste. Accordingly, they are just like provisions that this Court has deemed "virtually *per se* illegal," despite the fact that the facility that has been granted the processing monopoly is publicly owned.

According to the court of appeals, the local processing requirements imposed by the flow-control ordinances here are not discriminatory because private businesses within and outside the State are equally affected by the restriction. See Pet. App. 48a. As this Court explained in *Carbone*, however, a law that prefers intrastate over interstate commerce is "no less discriminatory because in-state or in-town processors are also covered by the prohibition." 511 U.S. at 391. That is self-evidently true here: Even though the flow-control measures favor public facilities, they nonetheless "artificially encourage in-state production even when the same [services] could be [provided] at lower cost in other States." *West Lynn Creamery*, 512 U.S. at 193. Accordingly, they discriminate against interstate commerce and should be invalidated.

b. Limiting interstate sales to state residents (import restrictions)

The flow-control provisions also are analogous to state and local measures—long deemed discriminatory by this Court—that prevent out-of-state sellers from competing for the patronage of in-state customers.

In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), for example, an ordinance prohibited the sale of milk in Madison that had not been bottled within five miles from the city's central square. Although the City defended the regulation as a health measure, the Court found it to be unconstitutional because it "excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois." *Id.* at 354. According to the Court, such provisions "would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Id.* at 356. Notably, they would have precisely the same impact had the bottling facilities been owned and operated by public rather than private entities.

Similarly, in *State of Minnesota v. Barber*, 136 U.S. 313 (1890), the Court invalidated a law requiring that all meat sold in Minnesota be inspected by a state-appointed inspector prior to slaughter. In practical effect, the provision amounted to "an absolute prohibition upon sales in Minnesota of meat from animals not slaughtered within its limits." *Id.* at 322. In holding the law unconstitutional, the Court emphasized that the statute denied citizens of other states the privilege of selling meat within Minnesota (*ibid.*) and that such provisions, if adopted widely, "would result in the destruction of commerce among the several states" (*id.* at 321). That would have been equally true if Minnesota's regulation had required meat to be slaughtered at publicly owned and operated slaughterhouses within the State rather than private ones.

Here, as in *Dean Milk* and *Barber,* a local government has used its regulatory power to deny out-of-state sellers the right to transact business with the Counties' commercial waste haulers. The regulatory foreclosure of the local market is no less offensive to the Commerce Clause because a public entity rather than a private business is the preferred in-state seller.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), is also instructive. There, a New York statute prohibited the importation of milk unless the importer had paid the producer an amount no less than the minimum price established for such transactions in New York. The purpose of the statute was to ensure that New York's controlled prices—which the State deemed essential to maintaining a steady and wholesome milk supply for its citizens—were not undercut by out-of-state competition. *Id.* at 523. The Court held that the provisions violated the Commerce Clause. As the Court explained, "[i]f New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Id.* at 522. This preclusion of interstate price competition surely would have been equally impermissible had the protected farms been owned and operated by the State rather than by private entities.

Although the facts are obviously quite different, this case implicates the same legal principles as *Baldwin*. In *Baldwin*, the State imposed price restraints to prevent out-of-state milk suppliers from undercutting the above-market prices that the State deemed necessary to support its milk industry. Here, the Counties have imposed flow control to prevent out-of-state competitors from undercutting the above-market prices the Counties deem necessary to support their local waste management facilities. Indeed, the regulatory restraint on interstate trade is more severe here than it was in *Baldwin* because the Counties' ordinances preclude competition by out-of-state firms at any price. As in *Baldwin*, the resulting restraints on interstate trade obviously function "to suppress or mitigate the consequences of competition between the states" (*ibid.*), in violation of the Commerce Clause.

According to the court of appeals, the trade restrictions in this case do not violate the Commerce Clause because "[t]he principal burden of any economic inefficiency imposed by the Counties' ordinances falls on the residents of the Counties," who "must pay over twice as much to dispose of their solid waste as they paid prior to the adoption of the ordinances." Pet. App. 48a. In *Dean Milk*, *Barber*, and *Baldwin*, however, in-state consumers also bore the brunt of the higher costs imposed by the protectionist measures at issue. Indeed, "[t]he cost of a tariff is also borne primarily by local consumers, yet a tariff is the paradigmatic Commerce Clause violation." *West Lynn Creamery*, 512 U.S. at 203.

As this Court has observed, citizens of states enacting protectionist measures "have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states as have the people of other states." *Barber*, 136 U.S. at 326; see also *Alexandria Scrap*, 426 U.S. at 809 ("every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any") (quoting *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)). Here, residents of the Counties have as much right to benefit from the free flow of interstate commerce as the out-of-state firms that seek their business. The fact that these in-state consumers apparently pay an economic price for their governments' protectionist enactments does not insulate those measures from strict scrutiny under the Commerce Clause.[7]

c. Hoarding resources for local residents

Finally, this case offends the principle that a State may not hoard in-state resources for the benefit of its own citizens. That principle was at work in *City of Philadelphia v. New Jersey*, in which the Court invalidated a provision that prohibited the disposal of waste from outside the State at landfills within the State. No argument was made that in-state commercial interests were benefited by the measure: To the contrary, New Jersey landfill operators were among the plaintiffs. 437 U.S. at 626. The Court nevertheless held that the New Jersey law "falls squarely within the area that the Commerce puts off limits to state regulation." *Id.* at 628.

As the Court explained, "a State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the grounds that they are required to satisfy local demands or because they are needed by the people of the State." *Id.* at 627 (quoting *Foster-Fountain Packing Co. v. Hayden*, 278 U.S. 1, 10 (1928)). According to

---

[7] It merits mention that one reason why localities prefer flow control to taxation and bond financing is that the economic burden of the former on local residents is less direct and therefore less likely to draw criticism. See PORTER, *supra*, at 112.

the Court, whether the State sought to keep articles of commerce within the State or outside it, "[w]hat is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628; see also *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (striking down provision that forbade the export of minnows for sale outside the state).

These principles apply squarely in this case. The Counties have prohibited privately owned articles of trade—waste—from being shipped and sold in interstate commerce so that all local demand for disposal of that material can be harnessed in support of facilities that serve the Counties' citizens. The prohibition is no less parochial or protectionist because the facilities are owned by the Counties themselves rather than by private businesses.

The court of appeals acknowledged that "[a] blanket prohibition against the hoarding of articles of commerce would appear to preclude the Counties' flow control scheme." Pet. App. 47a. In its view, however, "a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry, or investment over out-of-state competitors." *Ibid*. Cases such as *City of Philadelphia v. New Jersey* and *Hughes* do not support this distinction: In those cases, no "local business, industry or investment" was benefited by the challenged provisions. Nevertheless, this Court held that the States' efforts to isolate their citizens from the national economy constituted protectionist measures that were *per se* invalid under the Commerce Clause.

3. Governmental entities participating in the market may not employ their regulatory powers to favor their own facilities over out-of-state entities.

The court of appeals acknowledged that state or local measures discriminate against interstate commerce when they "favor[] in-state business or investment at the expense of out-of-state businesses." Pet. App. 46a. It held, however, that a public facility selling waste disposal services is not an "in-state business" for purposes of analysis under the Commerce Clause. That conclusion is in tension with this Court's decisions applying the market participant doctrine. Those cases make clear that when a state or local government enters the market—as the Counties have done here—it may not use its regulatory powers to favor that activity at the expense of interstate commerce.

This Court has explained that, in analyzing governmental activities under the Commerce Clause, it "cannot ignore the similarities of private businesses and public entities when they function in the marketplace." *Reeves, Inc. v. Stake,* 447 U.S. 429, 439 n.12 (1980). The Court has ruled that, "if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." *Wunnicke*, 467 U.S. at 93. In defining the limits of the market-participant doctrine, however, the Court has made clear that, when a State uses its regulatory muscle in connection with marketplace activity, it may not do so in a manner that disfavors interstate commerce.

For example, in *Reeves* the Court held that South Dakota could choose to sell cement produced by State-owned plants only to South Dakota citizens. As the Court explained, just as a private business owner is free "to exercise his own independent discretion as to parties with whom he will deal" (*Reeves*, 447 U.S. at 438-439), the Commerce Clause does not limit a State's refusal to deal with certain parties when it acts as a market participant. The Court was careful to point out, however, that the State could ***not*** use its regulatory power to give its plant a competitive advantage in the marketplace: In holding that South Dakota's conduct did not violate the Commerce Clause, it noted that the State had not "restricted the ability of private firms or sister States to set up plants within its borders." *Id.* at 444.

If South Dakota had ***required*** its citizens to purchase cement from its plant rather than from out-of-state providers, this Court undoubtedly would have held that its activity violated the Commerce Clause. Yet that is precisely what the Counties have been allowed to do here.

In *Wunnicke*, the Court invalidated Alaska's requirement that lumber purchased from the State be processed within the State prior to export. In holding that the requirement was discriminatory, the Court explained that the State could not use its market participation to impose a quasi-regulatory measure that the Commerce Clause would forbid. 467 U.S. at 96. The decision below turns *Wunnicke* inside out: It posits that, when the government itself is the seller of in-state processing services, it may use its regulatory power to require private actors to purchase those services rather than deal with competing out-of-state service providers. That result clearly is inconsistent with the spirit of this Court's decisions.

In *Daviess*, the Sixth Circuit highlighted this flaw in the Second Circuit's reasoning. 434 F.3d at 912. The court first explained that Daviess County had not ***eliminated*** the private market, as would be the case if the County had begun providing waste collection and disposal without charge to residents and businesses. Instead, it was clearly participating in the market: As the court observed, "[a] market is where a seller sells goods or services, and a buyer buys good or services." *Id.* at 908. Under the flow-control ordinance, "the market for solid waste disposal would continue to exist in Daviess County * * *, and Defendant would have a monopoly in that market. * * * Defendant would be forcing waste collectors to purchase its waste disposal services; Defendant would remain as the lone seller in this market as the result of its regulation." *Ibid.*

The Sixth Circuit explained that an ordinance favoring the County's transfer station was just as troubling as one favoring a local business because, as a practical matter, "Daviess County ***is acting as a local business in the local industry of waste disposal."*** *Id.* at 912 (emphasis added). It stated:

> [U]nder the Ordinance, Defendant would be acting in a dual role as a local business selling waste disposal services, and as a local government hoarding "waste, and the demand to get rid of it, for the benefit" of this business. *Carbone*, 511 U.S. at 392, 114 S. Ct. 1677. ***The fact that Defendant acts as both a business and a government, as opposed to just a government, does not cloak its facially protectionist activity from the appropriate scrutiny under the Commerce Clause.***

Ibid. (emphasis added).

The exact same thing is true here: The Counties have entered into the business of selling waste disposal services to private haulers, but are using their regulatory powers to force haulers to patronize their facilities rather than competing out-of-state facilities. This is impermissible: As this Court stated unequivocally in *Carbone*, "having elected to use ***the open market*** to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." 511 U.S. at 394 (emphasis added).[8]

---

[8] It merits mention that, in the case in which the Court first recognized the market-participant doctrine, the Court found it significant that "the commerce affected by the [challenged law] appears to have been created, in whole or in substantial part, by the [overall program of which the challenged law was a part]." *Alexandria Scrap*, 426 U.S. at 809 n.18; see also *id*. at 815-816 (Stevens, J., concurring). The present case presents the flip side of this situation: Commerce in processing services and recyclables pre-dated respondents' entry into the waste processing business and, by fiat,

As this Court stated in *Reeves*, "[t]he basic distinction * * * between States as market participants and States as market regulators makes good sense and good law." 447 U.S. at 436. The Second Circuit has impermissibly disregarded that distinction. Just as "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market" (*id.* at 437), there also is no basis to immunize from strict scrutiny State regulation that shelters the State's own commercial activity from interstate competition. To create such a loophole would violate this Court's admonition that a State's market participation may not be used to "swallow[] up the rule that States may not impose substantial burdens on interstate commerce." *Wunnicke*, 467 U.S. 98.

C. *Stare Decisis* Principles Command Reversal Of The Decision Below

Because only the most formalistic distinctions separate the flow-control provision in *Carbone* from the ones here, the decision below makes it a simple matter for state and local governments to re-introduce flow control. If widely adopted, this approach would effectively overrule *Carbone. Stare decisis* principles argue against such a sea change in the law governing interstate commerce in waste.

Since *Carbone* was decided, many flow-control provisions have been held unconstitutional.[9] In a high percentage

---

respondents have arrogated to themselves all of that pre-existing commerce.

[9] See, *e.g.*, *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1384-1385 (8th Cir. 1997); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, 1996 WL 612465, at *1-*3, *10 n.13 (D. Minn.

of those cases, the flow-control provisions required delivery of waste to public facilities.[10] In general, therefore, both

---

July 2, 1996); *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F. Supp. 935, 943 (M.D. Pa. 1994); *Empire Sanitary Landfill, Inc. v. Pennsylvania*, 684 A.2d 1047, 1056 (Pa. 1996).

[10] See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-716 (6th Cir. 2000) (ordinance requiring all waste to be processed at county-owned transfer station discriminated against interstate commerce); *Waste Mgmt., Inc. v. Metropolitan Gov't*, 130 F.3d 731, 733, 736 (6th Cir. 1997) (striking down flow-control ordinance that required all residential waste to be disposed of at publicly owned facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794, 809-810 (3d Cir. 1995) (two of the three designated facilities in one of two consolidated cases were publicly owned; case remanded for determination of whether process of designating facilities was discriminatory); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995) (holding that New Jersey regulations requiring flow control discriminated against interstate commerce, and making no distinction based on whether preferred facility was publicly or privately owned); *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1383 (8th Cir. 1993) (striking down ordinance that required all waste to be delivered to facility owned by waste district); *Nat'l Solid Waste Mgmt. Ass'n. v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644, 649-650 (S.D. Miss. 2003) (holding that municipal ordinances requiring delivery of local waste to publicly owned facilities discriminated against interstate commerce), rev'd in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004) (dismissing discrimination claim on the basis that plaintiffs lacked standing), cert. denied, 126 S. Ct. 332 (2005); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993) (striking down flow-control ordinance that required all waste to be disposed of at publicly owned facility), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994); *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct.

regulators and the regulated community understand that flow control "is no longer permitted." PORTER, *supra*, at 112).[11]

Despite the settled expectations of the waste industry, long-haul transporters, host localities, and waste generators that flow control is unlawful, states and local governments across the country remain eager to adopt flow control if the opportunity arises again. See Brief Amicus Curiae of the Bristol Resource Recovery Operating Committee, *et al.*, filed in *United Haulers II*, at 2 (group of local governmental entities contend that "flow control is integral to fulfilling" their responsibilities for solid waste management).[12] If the decision below is affirmed, it seems clear that many local governments that own (or can assume ownership of) waste processing facilities will impose flow control. Indeed, some have already done so. See *id.* at Appendix A (representation by several governmental entities that own waste facilities they have adopted flow control since *United Haulers I* was

---

App. 1997) (affirming order striking down ordinance that required recyclables to be delivered to county-owned processing facility).

[11] Flow-control ordinances that exempt waste destined for out-of-state processing or disposal are a possible exception to this general rule. Provisions containing such an exception generally have been upheld. See, *e.g.*, *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *Ben Oehrleins*, 115 F.3d at 1385-1387; *Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist.*, 1995 WL 253121 (S.D. Ohio Mar. 7, 1995). But see *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017 (D. Minn. 1999) (intrastate flow-control ordinance unconstitutionally burdened interstate commerce).

[12] As of 1995, at least 39 states and the District of Columbia had authorized localities to impose flow control. See United States Environmental Protection Agency, Report to Congress: *Flow Controls and Municipal Solid Waste* II-1 to II-5 (Mar. 1995), *available at* http://www.epa.gov/epaoswer/nonhw/muncpl/flowctrl/report chpt-ii.pdf.

decided); see also *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644, 649-650 (S.D. Miss. 2003) (assessing constitutionality of post-*United Haulers I* ordinance that requires waste to be disposed of at County-owned facility). In addition, the municipalities that have, in an effort to satisfy *Carbone*, exempted from their flow-control laws waste that is destined for out-of-state disposal will surely eliminate the exemptions. Thus, affirmance of the decision below would, in large measure, have the practical effect of overruling *Carbone.*

The Court should be particularly hesitant to take this step, given that "Congress [remains] free to decide whether, when, and to what extent the States may burden [the] interstate" waste services market with local flow-control regulation. *Quill Corp.*, 504 U.S. at 318. Because "Congress has the final say over regulation of interstate commerce, and it can change the rule of [*Carbone*] by simply saying so," "the doctrine of *stare decisis* has 'special force'" with respect to dormant Commerce Clause precedent, just as it does in statutory interpretation cases. *Id.* at 320 (Scalia, J., concurring) (quoting *Patterson v. McLean Credit Union*, 491 U. S. 164, 172-73 (1989), superseded by statute, Civil Rights Act of 1991, P.L. 102-166 § 101); cf. *ASARCO, Inc. v. Idaho Tax Comm'n*, 458 U.S. 307, 350 (1982) (O'Connor, J., dissenting) (the Court's "constitutional shortsightedness [in relying on the Due Process Clause rather than the dormant Commerce Clause] overlooks the fact that Congress, not this Court, holds the ultimate responsibility for maintaining a healthy system of interstate commerce").

This is especially true given that Congress actually considered whether *Carbone*'s holding should be modified legislatively and declined to take action. See *Quill Corp.*, 504 U.S. at 318. In the wake of *Carbone*, both Houses considered bills that would have grandfathered certain pre-*Carbone* flow-control laws. See Interstate Transportation of Municipal Solid Waste Act of 1995, S. 534, 104th Cong., 1st Sess.

(1995); Solid Waste Disposal Act, H.R. 4683, 103d Cong., 2d Sess. (1994). Other broader proposals would have given state and local governments the authority to enact flow control prospectively. See, *e.g.*, S. REP. 104-52, at 8-9 (1995); Martha M. Canan, *PSA Lobbying Congress to Give Municipalities Control Over Local Garbage Flow*, THE BOND BUYER, May 18, 1994; *Legislative Status Report*, THE BOND BUYER, Nov. 12, 1997. Notably, when it considered such proposals, the Senate understood that this "Court's ruling in * * * *Carbone* * * * has made it evidently clear that, absent Congressional action, the exercise of flow control by States and political subdivisions is unconstitutional." S. REP. 104-52, at 8.

Notwithstanding its understanding that flow control would remain unlawful unless it acted, Congress has left *Carbone*'s holding undisturbed. This Court, too, should reaffirm *Carbone* by reversing the decision below.

II. THE FLOW-CONTROL PROVISIONS FAIL THE *PIKE* TEST

Even if the Court concludes that the public ownership of the Counties' facilities exempts the Counties' flow-control ordinances from strict scrutiny, it should strike down the ordinances under the *Pike* test. As the court of appeals acknowledged, the flow-control ordinances have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing * * * interstate lines." Pet. App. at 13a. Such an "export barrier" (*ibid*.) imposes a severe burden on interstate commerce that cannot be justified by the local interests alleged to be at stake here.

A. The Flow-Control Ordinances Impose A Burden On Interstate Commerce That Is Excessive In Comparison To The Local Interests That It Serves.

Under *Pike*, when an evenhanded regulation has an incidental effect on interstate commerce, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. "[T]he extent of the burden that will be tolerated will * * * depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Ibid.* The *Pike* analysis "necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978). Here, the burden on interstate trade imposed by respondents' flow-control measures is so direct and substantial that it markedly outweighs the governmental interests asserted.

Justice O'Connor's concurring opinion in *Carbone* is instructive. She believed that Clarkstown's flow-control ordinance was exempt from strict scrutiny because "in-town competitors of the transfer facility [were] equally burdened" by the legislation. 511 U.S. at 405 (O'Connor, J., concurring in the judgment); see also *id.* at 404 ("the garbage sorting monopoly is achieved at the expense of all local competitors, be they local or nonlocal"). Although her starting point was thus very similar to that of the court of appeals, her conclusion was very different: While the Second Circuit took the view that the burdens on interstate commerce here are virtually nonexistent, Justice O'Connor concluded that Clarkstown's similar ordinance "impose[d] an excessive burden on interstate trade" that was not outweighed by the interests served by the measure. *Id.* at 405.

Justice O'Connor viewed the flow-control ordinance as imposing the very same burden on interstate commerce that caused the majority to deem it discriminatory: She noted that "the ordinance 'squelches competition in the waste-processing service altogether, leaving no room for investment from outside.'" *Id.* at 406 (quoting the majority opinion at 392). She concluded that the ordinance's "dramatic impact on the flow of goods" (*id.* at 405) could not be justified by the town's interest in ensuring the financial viability of the facility. As she explained, many non-discriminatory financing measures were available to the town, which "could finance the project by imposing taxes, by issuing municipal bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities." *Id.* at 405-406.

The exact same thing is true here: The flow-control ordinances create an overt barrier to interstate trade of the sort that has "been consistently invalidated by this Court under the Commerce Clause." *Pike*, 397 U.S. at 141-142; see also *id.* at 145 ("[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. * * * Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal."). At the same time, respondents could finance their waste management facilities without imposing any regulatory restrictions on interstate trade. See J.A. 215a. And the other ostensible justifications for the flow-control measures—promotion of recycling and avoidance of environmental liabilities—are equally spurious. See pages 17-19, *supra*.

Even when viewed in isolation, therefore, the flow-control measures do not satisfy the *Pike* test. But a regulation's true impact on interstate commerce must be evaluated "by considering * * * what effect would arise if not one, but many or every, [jurisdiction] adopted similar legislation."

511 U.S. at 406 (internal quotation marks omitted). As Justice O'Connor noted in *Carbone*, "[o]ver 20 states have enacted statutes authorizing local governments to adopt flow control laws." *Id.* 406.[13]

> If the localities in these States impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired.

Ibid. Such "pervasive flow control," she said, would "result in the type of balkanization the Clause is primarily intended to prevent." *Ibid.*

Here, too, the widespread adoption of the flow-control measures at issue would virtually "eliminat[e] the movement of waste between jurisdictions." *Id.* at 407.[14] Each jurisdiction's geographic boundaries would demarcate a separate region for the purchase and sale of waste processing, with no crossing of those boundaries in either direction. The resulting proliferation of separate trading areas would be antithetical to the basic purposes of the dormant Commerce Clause.

B. The Second Circuit's Application Of The *Pike* Test Was Fundamentally Flawed.

The Second Circuit's determination that respondents' flow-control measures satisfy *Pike* was not based on a searching evaluation of the provisions' benefits and burdens. To the contrary, both the trial court and the court of appeals categorically discounted the burdens associated with the flow-control laws on the ground that they affect private facilities within and outside the State the same way. That ap-

---

[13] As noted above, that figure rose to 39 by 1995.

[14] Indeed, the Counties' regime is some ways more insular than Clarkstown's: for example, haulers are not permitted to sell curbside recyclables in interstate commerce, but must deliver them to the designated in-state facilities.

proach—and the resulting decision to uphold the flow-control provisions despite the weakness of the justifications for them—plainly was erroneous.

The Second Circuit has repeatedly ruled that a non-discriminatory regulation need not be put through the *Pike* balancing test at all unless the putative burden on interstate commerce "***is qualitatively or quantitatively different from that imposed on intrastate commerce***." *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 217 (2d Cir. 2004) (citations omitted) (emphasis added). The Magistrate Judge (whose opinion was adopted by the district court) took this to mean that "regulatory provisions under scrutiny pass dormant Commerce Clause muster ***unless they treat out-of-state entities less favorably than similarly situated in-state concerns***." Pet. App. 95a (emphasis added); *see also ibid.* ("The critical inquiry * * * is whether an out-of-state business is treated less favorably than one similarly situated but within the state."). In the court's view, the fact that "a local private trash business is treated no differently" under the County's regulatory regime "than one situated out of state" was, by itself, dispositive. *Id.* at 96a. It therefore found that there was no need to "proceed to the next step of balancing the burdens against the putative benefits associated with the legislation." *Id.* at 99a; see also *id.* at 70a ("[I]t was not error * * * for the Magistrate Judge to decline to engage in the second part of the *Pike* balancing test by weighing non-existent burdens against obvious benefits.").

Unlike the district court, the court of appeals entertained the possibility that "regulations that explicitly create a prohibitory barrier to commerce for the benefit of a government entity * * * impose some differential burden on interstate trade which should be examined under the *Pike* test." Pet. App. 15a. But the suggestion that the court might broaden its understanding of the burdens cognizable under *Pike* proved to be an empty one. Because it believed that the provision did not affect the ability of in-state and out-of-state "businesses to compete on an equal footing," the court of appeals reasoned that "the burden imposed on interstate commerce must be insubstantial." *Id.* at 18a.[15]

This conclusion predetermined the outcome of the court's analysis. As it said:

> Our conclusion that the assumed burden created by the challenged ordinances is slight means that the defendants need to present only minimal showing of local benefit in order to compel a finding that this burden is not 'clearly excessive' to the benefits that the ordinances provide.

Ibid. As we discuss above (at pages 17-19), the putative benefits of the flow-control provisions are indeed "minimal." Predictably, however, the court of appeals concluded that they "easily clear[ed]" the low hurdle it had established for them. *Ibid*.

The lower court's understanding of the *Pike* test was fundamentally flawed: This Court never has indicated that searching review under *Pike* is available only when a regulation gives in-state businesses a competitive advantage over out-of-state businesses. Quite the contrary: The *Pike* test comes into play only when a state or local rule "regulates ***evenhandedly***" and thus has "only incidental" effects on interstate commerce. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (quoting *Pike*, 397 U.S. at 142) (emphasis added); see also *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). When a state or local

---

[15] In fact, the flow-control provisions do impose a differential burden on interstate versus intrastate commerce. Under the current regime, private haulers spend millions of dollars every year purchasing waste processing and disposal services from respondents' facilities. See J.A.174a. Yet these haulers have been flatly prohibited from purchasing these services in interstate commerce.

law ***does*** have a material differential impact on in-state and out-of-state commercial entities, it is deemed to have the "practical effect of * * * discriminating" against interstate commerce, and it is subject, ***not*** to the *Pike* test, but to the rule of virtual *per se* invalidity that governs discriminatory state regulations. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-351 (1977); see, *e.g.*, *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 281 (1987) (state tax that has a discriminatory effect will be struck down even if it does "not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory").

As Justice O'Connor explained, "[e]ven a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred." 511 U.S. at 405. Under this Court's decisions, the Commerce Clause requires invalidation of those measures that apply evenhandedly, but nonetheless unduly impede the flow of goods and services across state lines. See also, *e.g.*, *Raymond Motor Transp.*, 434 U.S. at 445 (invalidating even-handed truck-length regulation because it "impose[s] a substantial burden on the interstate movement of goods"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-530 (1959) ("state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must * * * bow"); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945) (striking down Arizona law regulating train lengths that "materially restrict[ed] the free flow of commerce across state lines").

Even if they are deemed even-handed, respondents' flow-control laws create an extreme "barrier * * * to bar out trade from other States" (*Nippert v. City of Richmond*, 327 U.S. 416, 425 (1946)), that should not lightly be upheld. Indeed, because they "require business operations to be performed in the home state that could more efficiently be performed elsewhere," they impose a "burden on commerce that has been declared to be virtually *per se* illegal." *Pike*, 397 U.S. at 145. Even though a public entity is the principal beneficiary of the flow-control laws, such significant burdens on interstate commerce cannot reasonably be regarded as "slight." Pet. App. 18a.

In holding that the flow-control provisions were permissible under *Pike*, the court of appeals also emphasized its view that the government, "consistent with the Commerce Clause, may impose a public monopoly encompassing the activities of waste collection, processing, and disposal." Pet. App. 17a. It stated:

> If a municipal government may *eliminate* the local private market for waste disposal services, we think it necessarily follows that a local government imposes no more than a limited burden on interstate commerce when it creates a partial monopoly with respect to solid waste management here, at the processing phase that has the ancillary effect of diminishing commerce in that same market.

Ibid. (emphasis in original).

That analysis suffers from several basic errors. First, the Second Circuit's premise is wrong: Although a municipal government may provide comprehensive waste management services to its citizens as a public service without violating the Commerce Clause—thus largely obviating the need for any flow-control regulation—there is no basis to conclude that it also may ***ban*** all private interstate trade in any waste having sufficient value to support such commerce.[16]

---

[16] The court of appeals cited *Gardner v. Michigan*, 199 U.S. 325 (1905), and *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), for the proposition that municipalities may "take exclusive control of all locally generated solid waste from the moment that it is placed on the curb." Pet. App. 17a. Because neither of these two cases involved ***interstate*** commerce in waste,

Second, even assuming arguendo that a municipality can entirely eliminate the private waste market when it provides comprehensive waste collection and disposal services to its citizens, that does not mean that the restrictions on trade here are acceptable. Respondents have ***not*** assumed responsibility for waste collection and disposal throughout Oneida and Herkimer Counties. Instead, many residents and businesses still bear their traditional obligation to remove and dispose of their own waste.

When in-state generators hire commercial haulers to remove their waste, the waste enters interstate commerce. See *Fort Gratiot Sanitary Landfill*, 504 U.S. at 359 ("Whether the business arrangements between out-of-state generators of waste and the [in-state] operator of a waste disposal site are viewed as 'sales' of garbage or 'purchases' of transportation or disposal services, the commercial transactions unquestionably have an interstate character."); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 55 (1922) ("we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise"). The Counties' use of regulatory power to force commercial haulers to bring that waste (and the associated tipping fees) to their own facilities constitutes a naked restraint on interstate trade. "[H]aving elected to use the open market to earn revenues for [their] project[s]" (*Carbone*, 511 U.S. at 394), the Counties are subject to the full power of the Commerce Clause when they impose regulatory restrictions in that market.

---

however, the Commerce Clause was neither raised nor addressed. Accordingly, "[t]hese cases cannot be read as foreclosing an argument that they never dealt with." *Walters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality op.); see also, *e.g.*, *United States v. Tucker Truck Lines*, 344 U.S. 33, 38 (1952).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

NOVEMBER 2006