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

REPLY BRIEF FOR PETITIONERS

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Respondents concede that *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), was "firmly grounded" in "established precedent" and "did not establish a new constitutional rule." Br. 11. Having embraced *Carbone*, they cannot salvage their flow-control ordinances without showing that the public-private distinction adopted by the Second Circuit is one that makes a constitutional difference. Yet they make only the most tepid of efforts to show that the logic and language of *Carbone* do not apply every bit as much to publicly owned facilities as to facilities that are owned by a private company but are soon to be converted to public ownership. *See* Br. 17 n.7. Moreover, respondents do not even acknowledge, much less respond to, our showing that the Second Circuit's holding rests on an invalidly narrow interpretation of this Court's local processing cases. Finally, respondents do not deny that adoption of the public-private distinction would make flow control a fact of life across the country and render *Carbone* a dead letter because many local governments either already own waste management facilities or can easily obtain record title to such facilities.

Indeed, the sheer number of *amicus* briefs lauding flow control confirms that, if given the legal authority to impose flow control, localities throughout the country will not hesitate to do so. Yet beyond asserting that some courts have found creative ways to uphold flow control (thus forcing some participants in the waste industry to live with it), respondents make no response to our argument that the *de facto* overruling of *Carbone* that would result from affirmance of the judgment below would upset settled expectations and should instead be left to Congress, which has full constitutional authority to authorize flow control should it conclude that the free flow of interstate commerce in waste is not in the public interest.

Rather than join issue with the arguments made in our opening brief, respondents (and their *amici*) attempt to shift the focus to the virtues of an "integrated" public waste man-

agement program and the supposed unreliability of the private market to achieve waste reduction and recycling objectives. As we discuss more fully below, all of their arguments suffer from one or both of two flaws: (1) they could have been (and in most cases were) made in support of the ordinance struck down in *Carbone*; and (2) they may be relevant to whether a particular flow-control ordinance should survive the strict level of scrutiny applicable to discriminatory enactments, but are irrelevant to the question here, which is whether the Counties' flow-control laws are discriminatory in the first place.

I. THE ASSERTED DIFFERENCES BETWEEN RESPONDENTS' FLOW-CONTROL SCHEME AND CLARKSTOWN'S CONCEDEDLY DISCRIMINATORY ARRANGEMENTS ARE INSUBSTANTIAL

In our opening brief (at 13-19), we showed that *Carbone*'s analysis of Clarkstown's flow-control provision fits the Counties' similar ordinances like a glove. We also demonstrated (at 26-33) that the Counties' flow-control scheme squarely implicates the concerns animating the "local processing" cases and other decisions that *Carbone* followed. Respondents make virtually no effort to refute our analysis of the meaning of *Carbone*. Instead, they contend that differences between the Counties' flow-control ordinances and Clarkstown's provision justify opposite treatment under the Commerce Clause.

A. The Flow-Control Ordinances Possess The Discriminatory Features Of Clarkstown's Ordinance

Respondents' contention that their flow-control provisions lack the discriminatory features that were fatal to Clarkstown's ordinance is misguided. Respondents first point out (Br. 16) that Clarkstown's ordinance covered out-of-state waste that had been brought into the town for processing, while their ordinances apply only to locally generated waste. Thus, they argue, "there is no burden shifted to the

residents or waste generators" of other States. *Ibid.*

This relatively minor difference from Clarkstown's ordinance does not justify departure from *Carbone*. The *Carbone* opinion does not treat the ordinance's impact on out-of-state waste as the principal (or even a particularly important) flaw in Clarkstown's flow-control scheme. Instead, the Court concluded that the flow-control law was unconstitutional because of its undoubted effect on ***local*** waste: It required the local processing of *Clarkstown*'s waste and therefore created a discriminatory barrier to interstate trade. See 511 U.S. at 386. Respondents do not deny that their flow-control regime imposes a functionally identical requirement for the local processing of local waste: As in *Carbone*, it entirely "bars the import of the processing service" (*id.* at 392) and thus is "just one more instance of local processing requirements that [the Court] long [has] held invalid" (*id.* at 391).

Second, respondents observe (Br. 16) that Clarkstown's ordinance was discriminatory because it designated a "single local proprietor" to receive waste, thus "favor[ing] that particular proprietor and disfavor[ing] all others, including competing facilities located out-of-state." Their argument that this distinguishes Clarkstown's ordinance from their own (*ibid.*) is predicated entirely on their assumption that the Authority is not a "local proprietor" within the meaning of *Carbone*. But there is no practical difference between the Counties' facilities and the facility involved in *Carbone*. The Clarkstown Transfer Station was built by a private company under a contract with the Town, which had decided to build the state-of-the art facility in order to provide waste disposal services for the community following the closure of its public landfill. See *Carbone* JA24-27. Thereafter, a private company operated the facility under a contract with the Town. See *id.* at 27. Similarly here, the designated transfer stations were constructed by and are operated by a private company under contracts with the Authority. See JA69a-95a, 176a-190a.

The fact that the Counties' facilities are operated via a public-private partnership that is indistinguishable from the one in *Carbone* – save for the functionally insignificant fact that Clarkstown's contractor temporarily held title to the Town's facility – compels the conclusion that the flow-control provisions that favor them are equivalent under the Commerce Clause. See Brief of the National Solid Waste Mgmt. Ass'n, *et al.* ("NSWMA Br."), at 18-19. Even if respondents' transfer facilities were operated entirely by public employees, however, the flow-control provisions would be discriminatory under *Carbone*. As we explained in our opening brief (at 13-17), the necessary implication of *Carbone* is that the regulatory foreclosure of the interstate market in favor of an in-state provider constitutes discrimination, regardless of whether the facility is owned by a private company or a local government. Respondents offer no good reason to conclude otherwise.[1]

B. The Public Purposes Of The Counties' Flow-Control Provisions Do Not Distinguish Them From Clarkstown's Ordinance

Having failed to identify any meaningful differences in either the flow-control provisions themselves or the facilities

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[1] Relatedly, respondents rely on *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), in which the Court stated that a law designed to "slow the flow of *all* waste into the State's remaining landfills" would not be discriminatory. Br. 14 (quoting 437 U.S. at 627). But the flow-control ordinances are ***not*** a "fair, across-the-board regulation of commerce" that simply "reduc[e] the amount of trade" in waste services, as respondents contend (Br. 32). Instead, the provisions ***direct*** commerce to the Authority's in-state facilities – allowing ***intrastate*** commerce to continue while eliminating only ***interstate*** commerce. Thus, the flow-control provisions are nothing like a general limitation on the sale of lead-containing paint or on cigarette advertising, as respondents contend (*ibid.*). Instead, they are equivalent to a regulation permitting consumers to purchase only paint or cigarettes that were manufactured by the government in local plants. Such a ban on interstate transactions clearly would violate the Commerce Clause.

that benefit from them, respondents next contend (Br. 17) that "[a]n examination of the different purposes of the Clarkstown and Oneida-Herkimer laws reveals the constitutional distinction." They elaborate that "Clarktown's arrangement with its operator was not public management," whereas "[t]he Oneida-Herkimer system is publicly managed." *Ibid.* Several of the *amici* echo this argument, contending that flow control is "presumptively valid" when it is part of an "integrated waste management plan." Brief of the State of New York, *et al.* ("NY Br."), at 8; see also, *e.g.*, Brief of the Arkansas Ass'n of Regional Solid Waste Mgmt. Dists., *et al*. ("Ark. Br."), at 15; Brief for the Fed'n of New York Solid Waste Ass'ns at 22-23; Brief of Envtl. Defense ("ED Br."), at 7-9. As we discuss below, however, neither they nor respondents can point to any meaningful differences between Clarkstown's supposedly "hasty arrangement * * * with its private transfer station operator" (Resp. Br. 19) and respondents' own waste management system. Nor do they explain how variations in the extent and quality of public management between the two systems can supply the basis for a sensible constitutional rule that requires a finding of discrimination in *Carbone*, but no similar finding here.

First of all, respondents' pejorative references to Clarkstown's waste management arrangements are entirely unwarranted. Although the Town had to act relatively quickly to replace the landfill it was closing, it engaged in careful planning for the construction and operation of its transfer station: It conducted an environmental assessment to ensure that the new facility would have no detrimental environmental impact (*Carbone* JA25); engaged in a competitive bidding process in order to select the company that would build and then operate the transfer station (*id*. at 26-27); held a public hearing regarding the selection of one of the eleven competing contractors (*id.* at 27); performed remediation at the transfer station site (*id.* at 27-28); and entered into an agreement with a neighboring town to manage its waste through the new facil-

ity (*id.* at 28-29). Thus, the flow-control measure was not an effort by the Town to foist its waste management obligations onto the private sector, but was "just one element of the Town's integrated transition of its solid waste management facility from landfill to transfer station." *Id.* at 30; see also Brief for the State of New York, *et al.*, in *Carbone* ("*Carbone* NY Br.") at 15 ("[T]he Town agreed to construct a state-of-the art transfer station that ultimately would form part of a county-wide solid waste management program.").

Respondents nevertheless argue that "the Counties and the Authority are taking possession of the region's waste in order to reduce the exposure of their *residents and businesses* to environmental liability, while Clarkstown less responsibly "commanded its citizens to deal with a private entity for waste service." Br. 21-22 (emphasis in original). According to respondents, their system insulates local generators from future liability for environmental cleanups, whereas Clarkstown's residents were left vulnerable to CERCLA liability as "arrangers" because "their transactions with the operator sent the waste on its way." *Ibid.* New York's brief makes much of this distinction, arguing that "a government's decision to take title to waste generated by its citizens" "implicates core sovereignty interests." NY Br. 9; see also Brief of the Economic Development Growth Enterprises Corp., *et al.* ("EDGE Br."), at 13 (arguing that flow control permits "collective responsibility for potential future environmental liability").

In fact, the Counties' generators are situated ***identically*** to Clarkstown's generators in this respect. In most areas in the Counties, the Authority does ***not*** provide "cradle-to-grave" services by picking up waste at curbside. JA97a, 209a. Instead, the prevailing waste management arrangements are ***exactly the same*** as in *Carbone*: Generators enter into contracts with private haulers; the haulers bring the waste to a facility designated by law; and the private contractor operating the facility then sends the waste to a disposal

site approved by the local government. If Clarkstown's generators were at risk of CERCLA liability for arranging to dispose of their waste in compliance with the Town's flow-control regulation, then the same surely can be said of generators within the Counties. Moreover, respondents do not explain why their arrangements should be understood to vest lawful "possession" of the waste with the government when Clarkstown's virtually identical arrangements did not.

Furthermore, there is no factual basis for respondents' suggestion (Br. 22) that Clarkstown "sat on the sidelines" and "relied on the private operator to manage waste" while exposing residents to the risk that the transfer station operator would "deliver Clarkstown waste to an environmentally-unsafe facility." To the contrary, in *Carbone*, as here, the Town defended its flow-control provisions as resting on "the traditional role of local governments in having responsibility *and* control for garbage removal versus the interest of the private waste service sector in substituting 'free trade' as a preferred system." *Carbone* Resp. Br. 15. Thus, Clarkstown required its contractor to "transport[] * * * the solid waste delivered to the transfer station to an approved landfill for final disposal." *Carbone* JA26; see also *id.* at 27 (Clarkstown's agreement with the landfill operator provided for "transportation to and disposal at permitted landfills outside of New York"). The Authority has a very similar arrangement with its own contractor, which has entered into an agreement with the Authority to deliver waste to a specified in-state landfill or other landfills receiving the approval of the Authority. JA177a.

In any event, the desire to protect local generators from unsafe disposal of their waste is irrelevant to the validity of the public-private distinction. The fact that the flow-control provisions serve a legitimate governmental interest is pertinent to whether they can ***withstand*** strict scrutiny, but does not drive the analysis of whether they must be examined under strict scrutiny in the first place. As this Court has made

clear, even legitimate governmental ends may not be achieved through discriminatory means when those interests can be served by non-discriminatory measures. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 ("the evil of protectionism can reside in legislative means as well as legislative ends"). By failing to argue that the flow-control measures can be justified under strict scrutiny, respondents implicitly concede that the Counties can employ other means to satisfy its objectives.

Indeed, as EDGE acknowledges (at 13), the Authority protects citizens by "ensuring that the waste [is] only sent for disposal to facilities with the best environmental protective systems and proven management experience." See also JA303a (letter from Authority Director Hans Arnold assuring residents that the flow-control system protects them from liability by sending waste to the modern Empire Landfill in Pennsylvania). The Counties can do the same thing without flow control, as many local governments now do, by requiring local haulers to certify that they will bring all waste to RCRA-compliant facilities or requiring them to obtain preapproval of any facility to which they desire to transport waste. See *Carbone*, 511 U.S. at 393; *id*. at 405 (O'Connor, J., concurring). Furthermore, generators who prefer to have the Authority control the ultimate disposition of their waste may employ haulers that patronize the Authority's facilities. Thus, as in *Carbone*, the argument that flow control is "necessary to ensure the safe handling and proper treatment of solid waste" (*id.* at 392-393) must be rejected.

Respondents next contend (Br. 22) that, "[u]nlike the fees charged by the Authority for its services, the citizens' fees in Clarkstown went to the operator." This alleged distinction also disappears upon examination. In Clarkstown as in the Counties, generators paid private haulers to pick up their waste and dispose of it; the haulers then brought the waste and paid tipping fees to the in-state facility designated by the government. Contrary to New York's contention (at 4) that

the "admitted purpose" of Clarkstown's flow control ordinance was "merely to bolster a local firm's revenue," these tipping fees were not used to enrich the Clarkstown Transfer Station's operator with monopoly profits. Instead, the fees were used to satisfy the financial obligations that the Town incurred when the transfer station was constructed at its behest. *Carbone*, 511 U.S. at 387 ("The town would finance its new facility with the income generated by the tipping fees.").

The tipping fees here serve the exact same purpose: They are used, in part, to pay off the public bonds that were issued to finance construction of the Counties' facilities. See JA213a. The Authority's director, Hans Arnold, admitted that flow control was devised as a means of "alleviat[ing] the County tax burden" and "keep[ing] the 'upfront' costs of the project off the real property taxes." JA307a-308a. Indeed, that financing objective was the principal purpose of the provision. See JA311a ("The ability to finance and then operate these facilities depends upon the legal commitment of the waste."). Thus, while respondents suggest that the Counties' ***upfront*** capital investment distinguishes their flow-control provision from Clarkstown's (Br. 23), that distinction is purely formalistic: ***Both*** the Counties and Clarkstown used flow control to fund the construction of their facilities without using tax dollars. See JA391a (observation of respondents' expert that "[p]olitical * * * considerations may make it desirable for the Authority to be a financially self-sufficient system with a direct funding source, as opposed to relying on annual appropriations from general tax revenues").

Relatedly, several of the *amici* argue that it is important to the discrimination analysis that the Counties' tipping fee, which they call a "system charge," does not merely cover the disposal costs but is used to support other aspects of the Counties' waste management system. See, *e.g.*, Ark. Br. 15. Respondents make a similar point in their discussion of the *Pike* test, arguing (Br. 37-38) that the flow-control provisions should be upheld because they allow the Authority to charge

fees that are high enough to subsidize their recycling and other programs.

The fact that the Counties are using flow control to generate revenues for their programs does not mean that these measures are not discriminatory. To the contrary, the Counties' insistence that generators and haulers spend all their waste disposal dollars within the Counties so that the funds can be used to benefit the local community reflects classic protectionism. See JA305a ("Long-term reliance on waste exportation would mean that most of the dollars collected in tipping fees (approximately $10 million per year) will leave the local economy, thus losing the economic benefits that would be associated with a new local landfill."); see also *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Mgmt. Corp.*, 770 F. Supp. 775, 781 (D.R.I. 1991) (finding flow-control regulation requiring delivery of commercial waste to public landfill to be "essentially protectionist" because the "profit" from the tipping fees was "used to finance such other programs as hazardous waste disposal, recycling, and construction of a waste-to-energy facility that [the local solid waste management authority] [was] charged with the responsibility of implementing"), aff'd, 947 F.2d 1004 (1st Cir. 1991) (per curiam).

Indeed, if respondents can justify the flow-control provisions on the ground that they use the "system fee" to support non-revenue-generating waste management activities, then there is no reason why they could not also justify monopolizing waste services to generate revenues for the public schools. As this Court stated in *Carbone*, however, "revenue generation is not a local interest that can justify discrimination against interstate commerce." See 511 U.S. at 393.

Were the rule any different, local governments would be able to monopolize all kinds of services that otherwise could be provided in the interstate market. For example, a town might seek to justify setting itself up as the monopolistic seller of milk to local residents by arguing that it intends to

use surplus "milk system fees" to fund milk safety programs and dairy farming innovations which the private sector could not provide. But it is unimaginable that the government's interest in financing these programs would be found to justify the exclusion of out-of-state sellers from the local milk market.[2]

Respondents next argue (Br. 24) that the Authority should not be viewed as competing with out-of-state firms because it provides services only to persons to whom it has "a governmental responsibility" and does not try to export its services to citizens of other States. That makes no difference to the analysis, however: This Court repeatedly has found regulations to be discriminatory even when the advantage given to in-state sellers affects only local buyers. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Minnesota v. Barber*, 136 U.S. 313 (1890). It is undisputed that out-of-state firms were interested in providing disposal services to haulers handling local waste but were prevented from doing so by the flow-control laws. See JA253a-259a, 269a-274a, 292a-293a. The assertion that the Authority is not competing with out-of-state firms is therefore entirely semantic, and does not affect the Commerce Clause analysis.

Respondents also argue (Br. 26) that the Counties' flow-

[2] New York points out that some States operate public lotteries while prohibiting private ones and that others have monopolized the retail sale of some forms of alcohol. NY Br. 12. Of course, no State can prohibit its residents from traveling to another State to purchase a lottery ticket. *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975). Moreover, whatever interest a State has in preventing residents from acquiring lottery tickets by mail or over the internet would be relevant to whether a prohibition survives strict scrutiny, not whether the prohibition is discriminatory. The same would be true of a state law requiring all liquor to be bought from state-owned stores and thereby effectively banning the purchase of liquor in interstate commerce were it not for the Webb-Kenyon Act, which expressly authorizes this kind of law. See *Granholm v. Heald*, 544 U.S. 460, 478-482 (2005).

control regime can be distinguished from Clarkstown's because it serves the "unique governmental purpose" of achieving "maximum levels of waste reduction and recycling." Precisely the same argument was made in *Carbone*. See *Carbone* Resp. Br. 31-32 ("Clarkstown's comprehensive control over the waste flow discarded within the Town limits enables it successfully to monitor and ensure compliance with its mandatory solid waste plan," which included mandatory recycling); see also *Carbone* NY Br. 24 ("[B]y increasing recycling and imposing volume-based disposal costs, the Ordinance promotes the reduction of the overall volume of solid waste to the fullest extent possible.").

Here, as in *Carbone*, the flow-control provisions' usefulness in promoting recycling cannot save them from invalidation, because the Counties indisputably can advance their waste reduction goals through non-discriminatory methods. See, *e.g.*, JA205a-206a, 216a, 226a-227a, 345a-347a. Contrary to respondents' contention that there is "no possibility that the federal, state, or local waste reduction and recycling objectives could be met" without flow control (Br. 38), such other measures have been shown to be equally if not more effective. See JA205a (citing an EPA study concluding that "there are no data showing that flow controls are essential * * * for the long term achievement of State and local goals for source reduction, reuse and recycling"); JA345a (citing another EPA study); JA468a (admission of Authority member that Utica was successful in encouraging waste reduction and recycling by employing a bag fee).

Furthermore, there is no basis whatsoever for respondents' contention (Br. 17) that the elimination of private competition is necessary because the goals of waste reduction and recycling are "antithetical to private sector waste interests." Many private companies are eager to provide recycling services and therefore are very supportive of governmental efforts to promote recycling. In fact, at least one private firm was actively engaged in recycling local residential

waste until the Counties' flow-control provisions barred it from contracting with private haulers for the purchase of curbside recyclables. JA97a.[3]

Respondents next argue (Br. 33) that petitioners are seeking to "use the Commerce Clause to shore up the old structure of the waste markets, in order to protect the position of low-cost landfills in these market." In fact, the "old structure of the waste market" that petitioners seek to protect is simply the interstate market, which this Court has repeatedly found to be entitled to protection under the Commerce Clause.

Thus, this case is not analogous to *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), as respondents contend (at 34). Although the state legislation at issue there changed the "particular structure" of the retail gasoline industry, it did not "prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Exxon*, 437 U.S. at 126. The flow-control provisions possess all of these flaws: They entirely prohibit the interstate movement of unprocessed waste, impose added costs upon interstate goods by requiring them to pass through an in-state facility before they can travel to an out-of-state disposal destination, and monopolize demand for the benefit of an in-state (albeit public) facility while withholding it from out-of-state firms.

Moreover, preserving interstate trade in waste will not block "innovative approaches to waste management," as re-

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[3] In any event, a locality has no legitimate interest (and certainly not a weighty one) in requiring generators to reduce the amount of waste they generate and to separate recyclables if those generators do not intend to send their waste to the locality's facilities. If an out-of-state waste-to-energy facility wants to maximize the amount of waste it receives in order to meet its contractual obligations to deliver energy to its customers (as respondents once did (see JA486a)), the generator's home county has no valid basis for thwarting that by imposing flow control for the logically incoherent purpose of reducing the amount of waste that ***it*** needs to dispose of.

spondents assert (at 34). The large, privately operated landfills that serve the interstate market are among the most technologically advanced and environmentally sound in the country. See NSWMA Br. 12-13; Brief of Sussex County, *et al.* ("Sussex Br."), at 13-14. Moreover, these landfills are heavily regulated by the EPA, state environmental agencies, and their host jurisdictions. See JA367a (statement of respondents' expert that the Authority chose the Empire Landfill in Pennsylvania to handle waste from its transfer stations because "Pennsylvania's environmental regulations * * * were more stringent than those in New York State"); JA344a ("Landfills now operate under strict regulations and do not present substantial, if any, externalities.").

C. The Other Proffered Theories For Distinguishing *Carbone* Are Unpersuasive

The *amicus* briefs offer several other arguments that the flow-control provisions here do not discriminate against interstate commerce. None of them provides a logical basis for distinguishing the Counties' flow-control provisions from the one in *Carbone.*

1. The brief of the National Association of Counties, *et al*. ("NAC Br.") argues that the market-participant doctrine affirmatively supports the Counties' imposition of flow control. NAC contends that the Court's market-participant decisions implicitly accept that local governments can use their power to impose taxes to support their market-based activities. See NAC Br. 10-15. NAC reasons that, if a local government can tax its citizens and displace the private market by directly providing waste collection and disposal as a public service, it follows that flow control must also be permissible. See *id.* at 15

NAC's syllogism is faulty. Just as "[i]t is no defense in an action charging vertical trade restriction that the same end could be achieved through vertical integration," so too there is no validity to "the contention that a State's action as a

market regulator may be upheld against Commerce Clause challenge on the ground that the State could achieve the same end as a market participant." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 98-99 (1984). Here, respondents concede (at 24) that the flow-control ordinances directly regulate commerce and do not fall within the market-participant exception. Respondents accordingly cannot avoid the application of strict scrutiny on the ground that they could have achieved similar results without flow control.

2. The Rockland County Solid Waste Management Authority contends that the so-called "state-action exemption" authorizes the flow-control provisions. As Rockland explains (at 5), the state-action exemption, under certain circumstances, provides local governments with immunity "from federal anti-trust prosecutions pursuant to the Sherman Act." Although the doctrine derives from the Court's interpretation of the antitrust laws and has never been applied to Commerce Clause challenges, Rockland contends (at 9-10) that there is an "incongruity" between the exemption of governmental monopolies from the antitrust laws and "the restraints imposed on state power by the Court's effort to curtail economic protectionism under the dormant Commerce Clause."

Neither this Court's decisions nor those of lower courts provide any support for the argument that the Commerce Clause and the Sherman Act should restrict governmental activities co-extensively. To the contrary, many of the state and local measures that this Court has invalidated under the Commerce Clause – including the flow-control provision in *Carbone* (see 511 U.S. at 424 n.13 (Souter, J., dissenting)) – would be covered by the state-action exemption to the antitrust laws. This argument thus has no force.

3. Several of the *amici* argue that the flow-control measures are non-discriminatory because they fall within the Counties' traditional police powers. See, *e.g.*, NY Br. 7; Ark. Br. 9-14. Respondents echo this argument in their dis-

cussion of the *Pike* test. See Br. 43 (arguing that the Counties are merely "exercising the power to provide traditional sanitation service to the community"). Of course, the same argument could have been made – and indeed was made – in *Carbone*. See *Carbone* NY Br. 23 ("Police power ordinances, such as Clarkstown's, have a strong presumption of validity."). As this Court has repeatedly ruled, however, even health and safety regulations which implicate core government functions are not exempt from strict scrutiny. See, *e.g.*, *Dean Milk Co.*, 340 U.S. at 354 (State may not adopt discriminatory regulations "even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable non-discriminatory alternatives are available"). Respondents offer no legitimate reason to abandon that well-established principle here.[4]

II. THE COUNTIES' COMPLETE BAN ON THE EXPORT OF UNPROCESSED WASTE FAILS THE *PIKE* TEST

If, despite our arguments, the Court concludes that the ownership of the preferred facilities makes the Counties' flow-control provisions non-discriminatory, it should strike down the provisions under the *Pike* test. Given the increasingly interstate character of the market for waste processing and disposal services (JA240a; see also Sussex Br. 7), a regulation that categorically excludes two counties' waste (amounting to about 200,000 tons per year (JA197a)) from the interstate market must be viewed as imposing a very substantial burden on interstate commerce. Respondents fail to refute our argument that this burden is excessive in comparison to the local benefits that the flow-control provisions os-

[4] Several of the *amicus* briefs cite *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner v. Michigan*, 199 U.S. 325 (1905), in support of their contention that the flow-control ordinances are presumptively valid. But no one disputes the observation in our opening brief (at 48 n.16) that the Commerce Clause was neither raised nor addressed in those cases.

tensibly provide.

A. Respondents Fail To Refute Our Demonstration That The Flow-Control Provisions Severely Burden Interstate Commerce

In our opening brief (at 8-10), we showed that the lower courts systematically discounted or ignored the substantial burdens on interstate commerce imposed by the flow-control provisions because the restrictions affect both in-state and out-of-state companies. Respondents do not dispute our characterization of the decisions below.[5] To the contrary, they continue to contend (Br. 30) that the flow-control provisions satisfy *Pike* because "there is [no] greater burden placed upon an out-of-state entity by the laws than on a similarly situated in-state entity."

That assertion, of course, is also the mainstay of respondents' argument that the ordinances are non-discriminatory. But even if the Court accepts respondents' view that the public ownership of the preferred facilities makes the Counties' flow-control provisions ***non-discriminatory***, that same fact should not also mean that the regulations do not ***burden*** interstate commerce. Indeed, respondents do not deny that their provisions impose ***exactly the same*** burden that was present in *Carbone*: a foreclosure of the local market for waste processing services which, if adopted generally, would ensure that no one ***ever*** crossed state lines to obtain that service.

Respondents next contend (Br. 30-31) that the construction of their transfer station actually increased the amount of waste entering interstate commerce because the Authority has at times sent residual waste out of state for disposal. The

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[5] Thus, the *Pike* issue does not present a mere "factual dispute" about the magnitude of the burden on interstate commerce, as the Onondaga County Resource Recovery Agency, *et al.* contend (at 24). Neither the Second Circuit nor the district court actually conducted the careful balancing of benefits and burdens that the *Pike* test requires. See Pet. App. 70a, 18a.

same argument could have been made in *Carbone* – Clarkstown's transfer station also sent waste to out-of-state landfills (*Carbone* Resp. Br. 36) – yet Justice O'Connor had little difficulty concluding that the flow-control provision excessively burdened interstate commerce. See 511 U.S. at 406 (O'Connor, J., concurring). In any event, respondents admit (Br. 26) that they will soon begin sending the entire nonrecyclable portion of the local waste stream to their captive in-state landfill. At that point, the County's waste disposal market will be hermetically sealed, with no out-of-state waste coming in, and no local waste entering the interstate market.[6]

Respondents argue (Br. 35) that the flow-control provisions necessarily impose an acceptable burden on interstate commerce because the Authority could lawfully institute public collection, thus displacing private haulers entirely. To be sure, a cradle-to-grave regime that displaced private competition without imposing any regulatory restrictions would be exempt from Commerce Clause scrutiny as ***market participation***.[7] But the fact that such a system would not implicate the Commerce Clause does not mean that the state's restriction of interstate competition through the exercise of its ***regulatory*** powers automatically satisfies the *Pike* test.

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[6] Respondents contend (Br. 23) that private companies are not barred from constructing facilities for handling out-of-state waste within the Counties. But no firm is likely to invest in such a facility when it will be unable to compete for local waste. JA206a, 214a.

[7] Respondents explain (Br. 35 n.17) that "[w]here public collection is instituted, municipalities may contract with private haulers to perform the service, and direct them to specific disposal facilities pursuant to the contracts." That is a straightforward application of the market-participant doctrine. See *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514-518 (2d Cir. 1995). The Commerce Clause does not afford the government similar leeway when it acts as a market regulator.

B. The Putative Justifications For The Counties' Flow-Control Provisions Do Not Justify The Burden On Interstate Commerce

Respondents cannot establish that the burdens imposed by the flow-control provisions are counterbalanced by the resulting local benefits. Many of the putative benefits of flow control are attributable to other features of the waste management system, which would provide the same benefits without flow control. All of them can be achieved by methods that are far less restrictive of interstate commerce.

For example, respondents argue that their system allows "the application of different technologies to different components of the waste stream." Br. 37. But respondents assuredly can "defin[e] the categories of waste that can be recycled, composted, or consigned to land disposal" (*ibid.*) without imposing flow control.

Respondents also contend (Br. 38) that the flow-control provisions permit them to encourage recycling by accepting recyclables free of charge. Many of the *amici* also identify the creation of incentives to recycle as the principal benefit of the ordinances. See, *e.g.*, ED Br. 11. As we discuss above, however, EPA has concluded that local governments can achieve recycling goals without subjecting their entire waste streams to an export embargo. JA205a, 345a.

Respondents next argue (Br. 38) that, "if haulers were allowed to take waste out of the Counties, the Authority would not be able to insist upon higher environmental standards at private landfills elsewhere." As noted above, however, the Authority may employ much less burdensome measures to ensure that waste is delivered only to environmentally safe facilities. There is no reason to doubt that this alternative would protect residents from environmental liability just as effectively as closing the State's borders to the export of unprocessed waste.

Addressing the burden that would result if other jurisdic-

tions were to adopt similar measures, respondents contend (at 39-40) that the widespread adoption of flow control would ***increase*** interstate commerce in waste. In light of this Court's rulings in *Carbone* and the other local processing cases, it must greet with skepticism any claim that interstate commerce is ***facilitated*** by requiring all waste to pass through a local governmental facility before leaving the state of origin. In any event, given the Counties' admission that they soon will withdraw from the interstate market entirely, it is inevitable that the burgeoning interstate market in waste management services will be dramatically reduced if communities across the country follow in the Counties' footsteps.

Further, there is no reason to credit respondents' prediction (Br. 40) that other jurisdictions will use flow control to send waste ***into*** interstate commerce, rather than to keep it ***out of*** interstate commerce as the Counties plan to do. Even though some jurisdictions may lack the space to construct new local landfills, as respondents assert (*ibid.*), flow control has more typically been used to finance expensive waste-to-energy facilities and incinerators (see JA317a-318a), which require much less space than landfills.

Respondents are equally off base in defending flow control on the ground that it allows communities "to select new and innovative technologies that provide greater benefits than the technologies currently in use." Br. 40-41. As noted above, while there is no reason to believe that local isolation fosters technological advance (JA201a), there is ample evidence that large landfills serving the interstate market enjoy economies of scale that permit them to employ the most advanced and environmentally protective waste management techniques. See JA202a-203a; Sussex County Br. 11, 13-14; NSWMA Br. 12-13. Flow-control provisions that cut off the interstate flow of waste will impede these advances.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2006