

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 “depriv[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

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT.....	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	2
INTRODUCTION AND SUMMARY OF ARGUMENT...10	
ARGUMENT	13
I. THE FLOW-CONTROL PROVISIONS DISCRIMINATE AGAINST INTERSTATE COMMERCE AND CANNOT SURVIVE THE STRICT SCRUTINY APPLICABLE TO DISCRIMINATORY REGULATIONS	13
A. The Flow-Control Provisions Fail Under The Reasoning Of <i>Carbone</i>	13
B. The Public-Private Distinction Adopted By The Court Of Appeals Is Irreconcilable With This Court’s Decisions.....	19
1. In <i>Carbone</i> , the Court implicitly rejected the public-private distinction.	20
2. The public-private distinction rests on an overly narrow reading of this Court’s prior Commerce Clause decisions.	26
a. Local processing requirements (export restrictions)	27
b. Limiting interstate sales to state residents (import restrictions).....	29

TABLE OF CONTENTS—continued

	Page
c. Hoarding resources for local residents	32
3. Governmental entities participating in the market may not employ their regulatory powers to favor their own facilities over out-of-state entities.	33
C. <i>Stare Decisis</i> Principles Command Reversal Of The Decision Below.....	37
II. THE FLOW-CONTROL PROVISIONS FAIL THE <i>PIKE</i> TEST	41
A. The Flow-Control Ordinances Impose A Burden On Interstate Commerce That Is Excessive In Comparison To The Local Interests That It Serves.....	42
B. The Second Circuit’s Application Of The <i>Pike</i> Test Was Fundamentally Flawed.....	44
CONCLUSION	50

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>ASARCO, Inc. v. Idaho Tax Comm’n</i> , 458 U.S. 307 (1982)	40
<i>American Trucking Ass’ns, Inc. v. Scheiner</i> , 483 U.S. 266 (1987)	47
<i>Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders</i> , 48 F.3d 701 (3d Cir. 1995)	38
<i>B.F. Goodrich Co. v. Murtha</i> , 958 F.2d 1192 (2d Cir. 1992)	19
<i>Baldwin v. G.A.F. Seelig, Inc.</i> , 294 U.S. 511 (1935)	30, 31
<i>Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County</i> , 115 F.3d 1372 (8th Cir. 1997)	37, 39
<i>Bibb v. Navajo Freight Lines, Inc.</i> , 359 U.S. 520 (1959)	47
<i>Brown-Forman Distillers Corp. v. New York State Liquor Auth.</i> , 476 U.S. 573 (1986).....	46
<i>Buck v. Kuykendall</i> , 267 U.S. 307 (1925)	14, 15
<i>C & A Carbone, Inc. v. Town of Clarkstown</i> , 511 U.S. 383 (1994)	<i>passim</i>
<i>California Reduction Co. v. Sanitary Reduction Works</i> , 199 U.S. 306 (1905).....	48
<i>Chemical Waste Mgmt., Inc. v. Hunt</i> , 504 U.S. 334 (1992)	13
<i>City of Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978)	2, 13, 32, 33
<i>Coastal Carting Ltd. v. Broward County</i> , 75 F. Supp. 2d 1350 (S.D. Fla. 1999).....	37

TABLE OF AUTHORITIES—continued

	Page(s)
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	26
<i>Dean Milk Co. v. City of Madison</i> , 340 U.S. 349 (1951)	29, 30, 31
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982).....	46
<i>Empire Sanitary Landfill, Inc. v. Pennsylvania</i> , 684 A.2d 1047 (Pa. 1996)	38
<i>Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Res.</i> , 504 U.S. 353 (1992).....	13, 49
<i>Foster-Fountain Packing Co. v. Hayden</i> , 278 U.S. 1 (1928)	32
<i>Freedom Holdings Inc. v. Spitzer</i> , 357 F.3d 205 (2d Cir. 2004).....	45
<i>Gardner v. Michigan</i> , 199 U.S. 325 (1905)	48
<i>H. P. Hood & Sons, Inc. v. Du Mond</i> , 336 U.S. 525 (1949)	32
<i>Harvey & Harvey, Inc. v. County of Chester</i> , 68 F.3d 788 (3d Cir. 1995).....	38
<i>Heier’s Trucking, Inc. v. Waupaca County</i> , 569 N.W.2d 352 (Wis. Ct. App. 1997).....	38
<i>Hughes v. Alexandria Scrap Corp.</i> , 426 U.S. 794 (1976)	23, 27, 32, 36
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979).....	33
<i>Huish Detergents, Inc. v. Warren County</i> , 214 F.3d 707 (6th Cir. 2000).....	38
<i>Hunt v. Washington State Apple Adver. Comm’n</i> , 432 U.S. 333 (1977)	47
<i>Lemke v. Farmers’ Grain Co.</i> , 258 U.S. 50 (1922).....	49

TABLE OF AUTHORITIES—continued

	Page(s)
<i>Nat'l Solid Waste Mgmt. Ass'n. v. Pine Belt Solid Waste Mgmt. Auth.</i> , 261 F. Supp. 2d 644 (S.D. Miss. 2003), rev'd in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004), cert. denied, 126 S. Ct. 332 (2005)	38, 40
<i>National Solid Waste Mgmt. Ass'n. v. Daviess County</i> , 434 F.3d 898 (6th Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3106 (June 28, 2006)	24, 25, 35, 36
<i>Nippert v. City of Richmond</i> , 327 U.S. 416 (1946)	47
<i>On the Green Apartments L.L.C. v. City of Tacoma</i> , 241 F.3d 1235 (9th Cir. 2001)	39
<i>Oregon Waste Sys., Inc. v. Dept. of Env't'l Quality</i> , 511 U.S. 93 (1994)	13
<i>Patterson v. McLean Credit Union</i> , 491 U. S. 164 (1989)	40
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	<i>passim</i>
<i>Quill Corp. v. North Dakota</i> , 504 U.S. 298 (1992)	26, 40
<i>Randy's Sanitation, Inc. v. Wright County</i> , 65 F. Supp. 2d 1017 (D. Minn. 1999)	39
<i>Raymond Motor Transp., Inc. v. Rice</i> , 434 U.S. 429 (1978)	42, 47
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429 (1980)	34, 37
<i>South Central Timber Development, Inc. v. Wunnicke</i> , 467 U.S. 82 (1984)	<i>passim</i>
<i>Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.</i> , 877 F. Supp. 935 (M.D. Pa. 1994)	38

TABLE OF AUTHORITIES—continued

	Page(s)
<i>Southern Pac. Co. v. Arizona ex rel. Sullivan</i> , 325 U.S. 761 (1945)	47
<i>State of Minnesota v. Barber</i> , 36 U.S. 313 (1890)	24, 30, 31, 32
<i>SSC Corp. v. Town of Smithtown</i> , 66 F.3d 502 (2d Cir. 1995)	6, 37
<i>Toomer v. Witsell</i> , 334 U.S. 385 (1948)	27, 28
<i>Trinova Corp. v. Michigan Dep't of Treasury</i> , 498 U.S. 358 (1991)	26
<i>U & I Sanitation v. City of Columbus</i> , 205 F.3d 1063 (8th Cir. 2000)	37
<i>United States v. Tucker Truck Lines</i> , 344 U.S. 33 (1952)	49
<i>Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist.</i> , 1995 WL 253121 (S.D. Ohio Mar. 7, 1995)	39
<i>Walters v. Churchill</i> , 511 U.S. 661 (1994)	49
<i>Waste Mgmt., Inc. v. Metropolitan Gov't</i> , 130 F.3d 731 (6th Cir. 1997)	38
<i>Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.</i> , 814 F. Supp. 1566 (M.D. Ala. 1993), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994)	38
<i>Waste Sys. Corp. v. County of Martin</i> , 985 F.2d 1381 (8th Cir. 1993)	38
<i>West Lynn Creamery, Inc. v. Healy</i> , 512 U.S. 186 (1994)	26, 29, 31
<i>Zenith/Kremer Waste Sys., Inc. v. Western Lake Supe- rior Sanitary Dist.</i> , 1996 WL 612465 (D. Minn. July 2, 1996)	37

TABLE OF AUTHORITIES—continued

	Page(s)
Constitution and Statutes:	
42 U.S.C. § 1983	6
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1292(a)(1).....	7
Civil Rights Act of 1991, P.L. 102-166 § 101	40
Interstate Transportation of Municipal Solid Waste Act of 1995, S. 534, 104th Cong., 1st Sess. (1995)	40
<i>Legislative Status Report, THE BOND BUYER,</i> Nov. 12, 1997	41
Solid Waste Disposal Act, H.R. 4683, 103d Cong., 2d Sess. (1994).....	41
S. Rep. 104-52 (1995)	41
U.S. Const. art. 1, § 8	2
Miscellaneous:	
Martha M. Canan, <i>PSA Lobbying Congress to Give Municipalities Control Over Local Garbage Flow</i> , <i>THE BOND BUYER</i> , May 18, 1994	41
RICHARD C. PORTER, <i>THE ECONOMICS OF WASTE</i> 112 (2002).....	18, 32, 39
United States Environmental Protection Agency, Re- port to Congress: <i>Flow Controls and Municipal Solid Waste</i> II-1 to II-5 (Mar. 1995), available at http://www.epa.gov/epaoswer/nonhw/ muncpl/flowctrl/report/chpt-ii.pdf	39

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 col-

lection 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 “pro-

ceed 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 Env’tl 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 ob-

ject 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 cer-

