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 OF *AMICI CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS

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INTEREST OF THE *AMICI CURIAE*

The National Solid Wastes Management Association ("NSWMA"), the American Trucking Associations, Inc. (ATA), and the National Association of Manufacturers (NAM) respectfully submit this brief as *amici curiae*.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made

NSWMA is a not-for-profit trade association whose 1700 member companies operate in all fifty states. Collectively, these private sector companies engage in nearly every aspect of solid waste management. NSWMA's members include collectors and transporters of solid waste; operators of solid waste treatment, storage and disposal facilities; waste recyclers; and firms providing legal, financial and consulting services to the waste management industry. NSWMA regularly represents its members in matters before the courts, Congress and regulatory agencies. It filed an *amicus* brief in support of the petitioner in the case of *C&A Carbone v. Clarkstown*, 511 U.S. 383 (1994), in which this Court held that Clarkstown, New York's flow control laws violated the dormant Commerce Clause.

ATA is a nonprofit corporation that serves as the national trade association of the trucking industry. It has over 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before the United States Supreme Court and other courts. ATA seeks to preserve the interstate market in solid waste and recyclable materials on behalf of the numerous ATA members already engaged in, or planning to become engaged in, the interstate transportation of such materials.

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a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters on file with the Office of the Clerk of this Court.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. NAM's members will be forced to pay increased solid waste disposal costs due to flow control laws if the decision below is not overturned.

The appeals court in this case has issued a strained and idiosyncratic interpretation of this Court's decision in the *Carbone* flow control case. While the overwhelming majority of federal courts that have addressed this issue in the twelve years since *Carbone* have applied a "virtually per se illegal" Commerce Clause standard of review, the federal appeals court below patched together its own unique reading of *Carbone*, and applied a far more lenient balancing test. For the reasons set forth below, and in Petitioners' Brief, this analysis and the resulting decision are legally unsupportable, and, if not reversed, will lead to a resumption of local solid waste disposal monopolies, to the detriment of solid waste haulers, disposal facilities, the communities that host and receive financial benefits from such facilities, long-haul transporters, and importantly, customers/waste generators. Further, the policy arguments for Respondents' flow control ordinances are fundamentally flawed, and there are other mechanisms that Respondents can use to achieve the purported economic and environmental benefits they seek.

Five years ago, NSWMA, ATA, and NAM warned that the Second Circuit's initial decision in this case provided a "blueprint" for local governments to evade their Commerce Clause obligations, and predicted that other localities, includ-

ing local governments outside the Second Circuit, would use this case as an excuse to prevent waste from entering the interstate market. Brief of Amici Curiae National Solid Wastes Management Association, *et al* (No. 01-686) at 6. Unfortunately, this prediction has come true. The past few years have seen a substantial increase in flow control laws and legal challenges to them under the dormant Commerce Clause. In many of these instances, local governments have sought to justify their monopolization of waste flow by citing to the Second Circuit's decisions in this proceeding. Unless reversed by this Court, the decision below threatens to disrupt even further the functioning of the interstate market for solid waste and recycling services.

Prior to this Court's decision in *Carbone*, the balkanization of that market was a major threat to the waste industry and to the businesses that depend on its services. By 1995, over 75% of the states had authorized flow control laws[2] and local governments were rushing to take advantage of the opportunity to ensure the success of their local disposal facilities by preventing the waste generated in the locality from being taken anywhere else. The predictable result was an escalation of prices for solid waste disposal, as protected facilities set their rates without fear of competition. See *The Cost of Flow Control*, National Economic Research Associates at 1-2 (May 3, 1995) (flow control adds about 33 percent to average landfill and transfer station disposal costs). Moreover, a snowball effect was rapidly developing, as other localities were forced to respond by enacting their own flow control laws to protect local facilities which previously had depended on out-of-state waste for their financial viability.

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[2] S. Rep. No. 104-52, at 5-6 (1995) (as of 1995, thirty-five states, the District of Columbia and the Virgin Islands directly authorized flow control, and an additional four states indirectly authorized it through local solid waste management plans, home rule or other mechanisms).

In *Carbone*, this Court unequivocally held that the challenged flow control ordinance discriminated against interstate commerce and that any "local problems," including health and environmental problems, could be solved by "the unobstructed flow of interstate commerce itself. . . ." 511 U.S. at 393. However, localities with existing flow control laws did not acquiesce gracefully to this Court's decision. In addition to seeking legislation from Congress specifically authorizing flow control laws (which was vigorously opposed by NSWMA),[3] localities sought to perpetuate flow control by attempting to distinguish their particular laws from those struck down in *Carbone* and by making cosmetic changes to their ordinances. Another wave of litigation ensued, and the courts once again became "clogged with cases challenging

[3] *See, e.g.*, Solid Waste Interstate Transportation Act of 2001, H.R. 1213, 107th Cong. § 2 (2001); Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. § 2 (2001); Solid Waste Interstate Transportation and Local Authority Act of 2001, S. 1194, 107th Cong. § 3 (2001); Solid Waste Interstate Transportation and Local Authority Act of 1999, H.R. 1190, 106th Cong. § 3 (1999); Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 663, 106th Cong. § 3 (1999); Municipal Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 872, 106th Cong. § 5 (1999); Municipal Solid Waste Flow Control Act of 1997, H.R. 943, 105th Cong. § 2 (1997); H.R. Res. 349, 104th Cong. § 2 (1996); State and Local Government Interstate Waste Control Act of 1995, H.R. 2323, 104th Cong. (1995); Local Governments Flow Control Act of 1995, H.R. 1085, 104th Cong. § 2 (1995); Public Debt Relief Act of 1995, H.R. 2838, 104th Cong. § 2 (1995); Municipal Waste Flow Control Transition Act of 1995, S. 485, 104th Cong. § 2 (1995); Municipal Solid Waste Flow Control Act of 1995, S. 534, 104th Cong. § 202 (1995); Flow Control Act of 1994, H.R. 4683, 103d Cong. § 1 (1994); Flow Control Act of 1994, S. 2227, 103d Cong. § 2 (1994); *Interstate Transportation of Municipal Waste and Flow Control: Hearing on S. 533, S. 663 and S. 872 Before the Senate Comm. on Environment and Public Works*, 106th Cong. (1999); *Transportation and Flow Control of Solid Waste: Hearing Before the Senate Comm. on Environment and Public Works*, 105th Cong. (1997); S. Rep. No. 103-322 (1994); H.R. Rep. No. 103-738 (1994).

restrictions on waste-related services, making garbage the modern legal battleground over the Commerce Clause." *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 713 (6th Cir. 2000). The courts promptly overturned many of these laws,[4] and localities gradually have been brought into compliance with their Commerce Clause obligations.

An affirmance by this Court, based on the meaningless "public-private distinction" invented by the Second Circuit, threatens to undo much that has been accomplished. In response to the Second Circuit's initial 2001 decision in this case, Pet. App. at 22a-53a, local governments throughout the United States have enacted flow control laws that rely on the Second Circuit's novel interpretation of *Carbone* and the dormant Commerce Clause. See *National Solid Waste Mgmt. Ass'n 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); *National Solid Waste Mgmt. Ass'n v. Pine Belt Regional Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644 (S.D. Miss. 2003), *rev'd in part*, 389 F.3d 491 (5th Cir. 2004), *cert. denied*, 126 S. Ct. 332 (2005); *Waste Mgmt. of Carolinas, Inc. v. New Hanover Cty.*, No. 93-113 (E.D.N.C. Feb. 21, 2003).

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[4] *See, e.g.*, *Huish Detergents*, 214 F.3d at 715-16; *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir.), *reh'g and reh'g en banc denied*, 2000 U.S. App. LEXIS 5173 (8th Cir. Mar. 24, 2000); *Waste Mgmt., Inc. v. Metro. Gov't*, 130 F.3d 731 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 712 (1995), *reh'g and reh'g en banc denied*, 1995 U.S. App. LEXIS 6454 (3d Cir. Mar. 28, 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017 (D. Minn. 1999); *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994); *City of Paterson v. Passaic County Bd. of Chosen Freeholders*, 753 A.2d 661 (N.J. 2000); *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct. App. 1997).

In the *Daviess County* case, the Sixth Circuit expressly "decline[d] to adopt" the "private-public distinction" created by the Second Circuit in this case. 434 F.3d at 909. Characterizing the Second Circuit's decision as "surprising," *id.* at 910, the Sixth Circuit "respectfully disagree[d] with the Second Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court." *Id*. While the courts have almost universally rejected the Second Circuit's *United Haulers* analysis, this has not deterred some local governments from passing new flow control laws. See, e.g., *Lebanon Farms Disposal, Inc. v. County of Lebanon*, No. 03-00682, 2006 WL 1876622 (M.D. Pa. July 5, 2006) (in-validating 2003 flow control law directing solid waste to government-owned landfill). The continued enactment of anti-competitive flow control laws, which create local waste monopolies immunized from the benefits of free market competition, poses a threat to the solid waste industry, long-haul transporters, the communities that host landfills and others. Overturning the flawed decision below is thus essential to ensure that the interstate trade in solid waste and recyclables, and the important constitutional principles underlying the Commerce Clause, are not thwarted.

SUMMARY OF ARGUMENT

Unless the decision of the court below is promptly reversed, the interstate market in solid waste and recyclables will be seriously disrupted. Over 60 percent of the nation's waste facilities currently are owned by public entities.[5] The Second Circuit's decision, by providing a blueprint for governments to evade *Carbone*, virtually ensures that flow control laws promptly will be re-enacted with respect to many of those facilities, thereby locking millions of tons of waste

[5] Chartwell Information, *Directory & Atlas of Solid Waste Disposal Facilities 2003*, Table 2 at vii (7th ed. 2003) (62% of waste facilities are publicly owned).

out of the interstate market. Such effects will not be limited to states in the Second Circuit. Virtually every state in the nation receives waste from other states. Indeed, since the Second Circuit's initial decision in this case, local governments in Kentucky (Daviess County), Mississippi (Pine Belt Solid Waste Management Authority), Pennsylvania (Lebanon County) and elsewhere have adopted flow control laws, some of which rely expressly on the Second Circuit's erroneous interpretation of *Carbone* and the dormant Commerce Clause.

The Second Circuit's decision is at odds with both modern business realities and this Court's current Commerce Clause jurisprudence. By making the constitutionality of a flow control ordinance turn on the ownership of the favored facility, the court below has ignored the practical economic effect of the ordinance—which this Court repeatedly has emphasized is the key determinant when analyzing issues of discrimination against interstate commerce. *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) ("*ATA*"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The effect of flow control on competing out-of-state waste facilities and on the haulers, interstate trucking companies, railroads and barge lines that seek to transport waste to those facilities is the same regardless of whether the favored local facility is privately or publicly owned. The effect also will be felt by the generators who use these facilities. This Court, in *Carbone*, already has concluded that the economic effects of flow control are "interstate in reach," 511 U.S. at 389, and that such laws discriminate against interstate commerce. A difference in the ownership of the facilities favored by a flow control ordinance cannot change that reality.

ARGUMENT

I. THE SECOND CIRCUIT'S INTERPRETATION OF *CARBONE* AND THE DORMANT COMMERCE CLAUSE IS FUNDAMENTALLY FLAWED

The Second Circuit's interpretation and analysis of the Court's decision in *Carbone* and its application of the dormant Commerce Clause are fundamentally flawed. As set forth by Petitioners in their brief, the appeals court's ruling that the *Pike* balancing test applies when a flow control law designates government-owned waste disposal facilities as the recipient of waste is at odds with both well-settled precedent and common sense.

None of this Court's dormant Commerce Clause cases remotely suggests that there is some sort of "public-private distinction" between government-owned and privately-owned facilities. The dormant Commerce Clause's overriding purpose is to prevent states or local governments from placing themselves "in a position of economic isolation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949). As a result, when local governments establish barriers to interstate trade, a "virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Indeed, the Court has routinely found "parochial legislation of this kind to be constitutionally invalid." *Id.* at 627.[6] The same dormant Commerce Clause analysis was applied by the Court in a series of decisions that struck down efforts by states to discriminate against out-of-state waste. See *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality*, 511 U.S. 93 (1994); *Fort Gratiot Landfill v. Michigan Dept. of Natural*

[6] See John Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone and Its Progeny*, 7 Vill. Env. L. Journal 203, 260 (1996) ("The Commerce Clause serves an important—indeed, irreplaceable—function as a mandate for economic cooperation and unification.").

Resources, 504 U.S. 353 (1992); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); *Philadelphia v. New Jersey*, *supra.*

Since *Carbone* was decided, it has been understood by all parties with a stake in solid waste disposal—including municipalities and counties as well as solid waste facility operators, recyclers and haulers—to apply to privately-owned and publicly-owned facilities alike. This seemed apparent from *Carbone* itself, where the transfer station protected by the flow control ordinance was privately owned at the time of the litigation, but was scheduled to revert to municipal ownership shortly after the Court issued its decision.[7] Yet despite the filing of an amicus brief urging this Court to limit its decision to privately-owned facilities[8] and a vigorous dissent urging that the Clarkstown ordinance be upheld because the "one proprietor so favored is essentially an agent of the municipal government,"[9] the majority opinion did not even hint that the constitutionality of the ordinance might hinge on whether the case was decided before or after Clarkstown exercised its option to purchase the facility.

In the aftermath of *Carbone*, at least three courts of appeals and three district courts invalidated flow control laws where the facility at issue was publicly owned.[10] When New

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[7] *Carbone*, 511 U.S. at 383. Shortly after the Court issued its decision in *Carbone*, ownership of the transfer station reverted to the Town of Clarkstown.

[8] *See* Brief of *Amicus Curiae* City of Springfield, Missouri at 11-15, *Carbone* (No. 92-1402).

[9] *Carbone*, 511 U.S. at 416 (Souter, J., dissenting). Moreover, the Clarkstown ordinance on its face referred to the designated transfer station as "the Town of Clarkstown solid waste facility. . . ." *Id.* at 396.

[10] *See U & I Sanitation*, 205 F.3d at 1065-66, 1071-72 (city-owned transfer station); *Waste Mgmt.*, 130 F.3d at 733, 736 (publicly owned waste-to-energy facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794 (3d Cir. 1995) (county owned landfills), *cert. denied*, 516 U.S.

Jersey's state-wide flow control system, which favored both privately-owned and government-owned disposal facilities, was declared unconstitutional by the Third Circuit, see *Atlantic Coast Demo. & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995), the appeals court did not draw any distinction between those disposal facilities based on who owned them.[11]

Most recently, in *NSWMA v. Daviess County*, the Sixth Circuit expressly declined to follow the Second Circuit's "surprising" interpretation of the *Carbone* decision. 434 F.3d at 909-912. Carefully parsing the language of *Carbone*, it concluded that "[f]or every sentence in the decision that can be interpreted as supporting such a distinction, there is a sentence that can be interpreted in opposition." *Id*. at 910. The Sixth Circuit also found the Second Circuit's interpretation of other dormant Commerce Clause decisions to be "similarly strained." *Id.* at 912. District courts that have had occasion to address the significance of public versus private ownership of waste facilities have similarly concluded that public ownership made no difference.[12]

1173 (1996); *Lebanon Farms*, supra; *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, No. 5-95-228, 1996 WL 612465, at **1-3, 10 n.13 (D. Minn. July 2, 1996) (waste-to-energy facility owned by waste district); *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152, 154 (D. Conn. 1996) (publicly owned waste disposal plant).

[11] Many of the facilities favored by New Jersey county flow control laws were government-owned. See *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 112 F.3d 652, 673-82 (3d Cir. 1997) (App.) (identifying specific government-owned disposal facilities designated under New Jersey's flow control laws).

[12] *See National Solid Wastes Mgmt. Ass'n v. Pine Belt Solid Waste Mgmt. Auth*, 261 F.Supp.2d 644 (S.D. Miss. 2003) (rejecting Second Circuit's analysis of *Carbone*), *rev'd on other grounds*, 389 F.3d 491 (5th Cir. 2004); *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth*., 877 F. Supp. 935, 943 (M.D. Pa. 1994)

II. CREATING A PUBLIC OWNERSHIP DISTINCTION COULD FUNDAMENTALLY ALTER THE CURRENT EFFICIENT AND ENVIRONMENTALLY PROTECTIVE INTERSTATE WASTE DISPOSAL SYSTEM

If the public ownership exception to traditional dormant Commerce Clause principles invented by the Second Circuit is affirmed, it could have a dramatic adverse impact on the efficient and environmentally protective interstate waste disposal system that has developed over the past several decades. As a result of tough federal regulations issued under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (RCRA), many small municipal "dumps" closed.[13] In response, both private industry and local governments developed and opened larger, more environmentally protective sanitary landfills that receive waste from larger geographic "wastesheds." Often, these wastesheds cross state lines. These modern sanitary landfills have sophisticated groundwater monitoring, leachate collection and gas collection and control systems as required under the RCRA Subtitle D regulations, 40 C.F.R. Part 258. The U.S. Environmental Protection Agency (EPA) recognizes that modern landfills are "well-

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(invalidating a flow control law and stating that the Court was "not persuaded that the public nature of the [designated] facility changes the applicable analysis"). *See also Pine Ridge Recycling v. Butts County*, 855 F. Supp. 1264, 1275 (M.D. Ga. 1994) (finding that local government officials "engineered to prohibit a competitor from entering the waste disposal market" in order to subsidize construction of a new publicly owned landfill, and explaining that "[i]t should make little difference that the [waste authority] owns its [landfill] currently and the facility in *Carbone* would be turned over to the town after five years of private operation. Such a distinction would focus on form and ignore substance") (emphasis added).

[13] The number of landfills in the United States has declined from nearly 8,000 in 1988 to fewer than 1,700 in 2004. Biocycle, *The State of Garbage in America*, (April 2006) at 27.

engineered facilities that are located, designed, operated, and monitored to ensure compliance with federal regulations."[14] At a growing number of landfills, methane emissions are captured and sold to local utilities or end-users, reducing landfills' contribution to greenhouse gases.[15]

The *United Haulers* decision threatens many of these landfills and the economic viability of the communities in which they operate. If local governments continue to enact flow control laws based on *United Haulers*, some of the waste received by these landfills will be forced instead to local, government-owned disposal facilities. Equally important, local governments that host these modern waste disposal facilities and receive a substantial portion of their annual revenue from them could face a major fiscal crisis. Landfills pay "host fees" to the local community as high as $4.50 for each ton received. Rick Hampson, *Trash Provides 'Horn O' Plenty For Towns*, USA Today (Sept. 29, 2003) at 15A. These fees often exceed one million dollars annually. *Id.* In some communities, these proceeds are a significant percentage of the local government's annual revenue. *Id.*[16]

The impact may be greatest in the states that receive substantial quantities of solid waste from other states. As of

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[14] U.S. Environmental Protection Agency, Wastes, Solid Waste Landfills (last updated Oct. 6, 2006) at www.epa.gov/epaoswer/non-hw/muncpl/landfill/sw_landfill.htm.

[15] See generally Landfill Methane Outreach Program (LMOP) at www.epa.gov/lmop. The EPA estimates that the nearly 400 landfills in its landfill methane program have "prevented the release of nearly 21 million metric tons of carbon equivalent (MMTCE—the basic unit of measure for greenhouse gases) into the atmosphere over the past eleven years." See www.epa.gov/lmop/accomplish.htm. The energy generated by these landfills has also offset the use of 162 million barrels of oil, *id.*, a number that increases daily.

[16] For example, host fees paid by one Pennsylvania landfill comprise 24 percent of the receiving municipalities' budgets. Douglas Brill, *Less Trash Means Less Cash*, Easton Express-Times (Oct. 23, 2006).

2003, ten states received more than one million tons originating in other states. James McCarthy, *CRS Report for Congress: Interstate Shipment of Municipal Solid Waste: 2004 Update* (Sept. 9, 2004) at Table 1. New York alone exported more than 8 million tons of solid waste in 2003, including 3.7 million tons to Pennsylvania, 1.7 million tons to Virginia, 1.6 million tons to New Jersey, 887,000 tons to Ohio, and smaller quantities to Georgia, Massachusetts, Michigan and West Virginia. *Id*. at CRS-21. Host communities in those states which receive and depend on the revenue associated with New York waste are threatened by the very real likelihood that this funding source will be cut off if the public-private distinction invented by the Second Circuit receives this Court's blessing. Nationwide, tens of millions of tons of solid waste are susceptible to immediate "hoarding" by trash-hungry localities—if the decision below is allowed to stand.

Indeed, the entire intricate web of solid waste companies and facilities that provide cost-effective service to residents, businesses and local governments in the Northeast and throughout the United States will be impacted adversely unless the Second Circuit's decision is overturned. Many local and national waste collection companies in the Northeast and elsewhere collect trash and dispose of it at transfer stations owned by private waste companies. These companies, in turn, contract with long-haul trucking companies and railroads to transport trash from the transfer stations to landfills and waste-to-energy plants in other states.[17] In New

[17] In New York City alone, more than 250 licensed haulers collect commercial and industrial solid waste. Most of the thousands of tons of New York City solid waste collected daily by these haulers is processed at transfer stations and disposed of at landfills or waste-to-energy plants in New Jersey, Pennsylvania, Virginia, Ohio and other states. *See* Eric Lipton, *City Trash Follows Long and Winding Road*, N.Y. Times, Mar. 24, 2001.

York, numerous waste collectors operating in counties with publicly-owned disposal facilities currently dispose of waste at facilities in other states. If the Court does not overturn the decision below, local governments in those counties will be able to initiate monopolies, or reestablish their pre-*Carbone* monopolies, on solid waste disposal services. This will have immediate adverse consequences for companies that have acquired, constructed or expanded state-of-the-art facilities in other states in reliance on the assumption that they would be able to compete freely in the interstate market for the solid waste needed to operate those facilities efficiently. The Second Circuit's decision similarly threatens the interstate market in recyclables, as flow control measures often encompass recyclable materials in addition to solid waste.[18] Flow control measures restricting delivery of recyclables to local, publicly owned facilities to the detriment of competing out-of-state facilities will seriously disrupt the interstate market for recyclables and the industries that depend on that market.[19]

Counties and municipalities in states that receive out-of-State waste can hardly be expected to stand idly by if local governments in exporting states take advantage of a new-found ability to hoard waste for their publicly-owned facilities. In Pennsylvania, for example, which received more than 3.7 million tons of waste from New York in 2003,[20] or in other states, a loss of waste originating in New York will undoubtedly lead to flow control laws as local governments act to hoard all of their own "homegrown" product. The resulting spiral of protectionist legislation is precisely the

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[18] In the case at bar, the local flow control ordinances apply to both solid waste and recyclables. Pet. App. at 4a-5a.

[19] *See, e.g., U & I Sanitation*, 205 F.3d at 1069 (discussing the interstate effect of flow control on the recyclables market).

[20] *CRS Report* at CRS-21.

profound harm that *Carbone* (and the Commerce Clause more generally) was intended to halt. *See Carbone*, 511 U.S. at 390 ("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").

Nor would the effects of the public-private distinction be limited to those facilities that are publicly owned at this moment in time. New facilities will undoubtedly be structured so as to incorporate public ownership. For example, it would have been a simple matter for Clarkstown to have assumed ownership of the transfer station at the outset (subject to a security interest) while contractually promising the entity that constructed and managed it the right to receive all tipping fees for five years. Under the decision below, it then could have used flow control to ensure that the private company's investment was recouped within those five years. Moreover, there is nothing to prevent a county or municipality that is currently providing financial support to a privately owned facility (as Clarkstown did in *Carbone*) from restructuring its relationship with the private company so as to vest ownership in a public body—and thereby make itself eligible for flow control. Under the Second Circuit's novel decision, there is no requirement that a waste facility be publicly owned from the outset. Presumably a formerly private facility converted to a publicly-owned facility would be entitled to the benefit of flow control laws once the conversion had been accomplished.[21] Nor does the Second Circuit's decision require the city or county itself to become the owner of the facility. Indeed, in this case the two counties

[21] Under the Second Circuit's rationale, it would appear that even Clarkstown, New York—whose flow control ordinance was declared unconstitutional by this Court in *Carbone*—could argue that its ordinance is now constitutional because it now owns the facility.

involved created a "waste management authority" to acquire ownership of the facilities.[22] And because the "public owner" is free under the Second Circuit's decision to hire a private company to actually operate the facility,[23] there is little, if any, disincentive to conversion.

Given the enormous financial benefits that flow control laws can bring to a local government, there can be little doubt that counties and municipalities will quickly move to take advantage of the conversion option wherever possible.[24] While this will necessarily require the cooperation of existing private owners, the monopoly profits made possible by flow control should be more than enough to outweigh the costs of conversion and make the conversion desirable for both the local government and the private owner. Thus, the financial balance is likely to weigh heavily in favor of conversion, further exacerbating the pernicious effects of the public-private distinction invented below.

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[22] Under the agreement between the counties and the waste management authority, the authority is to manage and dispose of all solid waste within the counties and operate the local energy recovery facility and recycling center. In return, the counties guarantee the authority's operating costs and debt service payments. Pet. App. at 26a.

[23] Pet. App. at 28a.

[24] Of course, flow control imposes substantial financial penalties on haulers who are forced to pay disposal prices not subject to free and fair market competition. In this case, the record reveals that haulers were forced to pay $86 per ton when disposing of waste at Respondents' facilities, when the market rate at other nearby landfills was less than $30 per ton. Pet. App. at 29a-30a.

III. THE SECOND CIRCUIT'S EMPHASIS ON FACILITY OWNERSHIP IS AT ODDS WITH MODERN BUSINESS REALITIES AND THIS COURT'S CURRENT COMMERCE CLAUSE JURISPRUDENCE.

The essential premise of the Second Circuit's decision is that there is such a fundamental difference between privately-owned and publicly-owned waste facilities that a different set of Commerce Clause principles should apply. This premise, however, is simply wrong. In today's world, public and private waste facilities are equal in the eyes of regulators and the marketplace. The decision as to whether a particular facility should be structured as a publicly owned or privately owned entity is typically driven by practical business considerations, such as the most advantageous financing mechanism, potential tax consequences, and other issues, that are wholly unrelated to the theoretical concepts that underlie the Second Circuit's decision.

In this context, it makes no sense to conclude, as did the Second Circuit, that the constitutionality of flow control laws enacted to funnel all trash in two upstate New York counties to a local facility should turn on whether that facility is publicly or privately owned. This is highlighted by the fact that in over 500 counties throughout the United States, including dozens of counties in New York alone, there is a mix of privately owned and publicly owned waste facilities.[25] In such counties, private sector landfills, waste-to-energy facilities and transfer stations compete directly with publicly owned facilities for solid waste. Under the Second Circuit's "surprising" decision, a flow control law would be valid as to the publicly owned facilities in these counties and invalid as to the privately owned facilities, even though the difference in

[25] Chartwell Information, *The Directory & Atlas of Solid Waste Disposal Facilities 2003* (7th ed. 2003).

ownership has no practical impact either on the way in which the flow control law affects interstate commerce or on the day-to-day operation of the facilities. The constitutionality of a flow control law would thus turn not on an ordinance's effect on interstate commerce, but on the mere happenstance of who holds ownership in the particular facilities.

This myopic focus on ownership is at odds with both the general thrust of modern business law and this Court's current Commerce Clause jurisprudence. From the business law perspective, the clear trend is to look to the substance of a transaction, rather than technical ownership. A prime example is found in Article 9 of the Uniform Commercial Code ("UCC"), which has been adopted by all fifty states and the District of Columbia. Since 1962, the UCC has provided that the location of title to collateral (*i.e.*, ownership) generally is immaterial for purposes of determining the rights and duties of parties to a secured transaction.[26] This simply reflects the reality that property ownership is no longer of talismanic significance in business transactions. The Second Circuit's "form over substance" approach is also contrary to this Court's current Commerce Clause jurisprudence. Addressing the Commerce Clause issues raised by certain state taxes on interstate motor carriers, this Court in *ATA* emphasized that it had "'moved toward a standard of permissibility of state taxation, based upon its actual effect rather than its legal terminology.'" 483 U.S. at 295 (quoting *Complete Auto Transit v. Brady*, 430 U.S. 274, 281 (1977)). Eschewing the "metaphysical approach to the Commerce Clause that focused primarily on the character of the privilege rather than the practical consequences of the tax," *id*. at 294-95, the Court evaluated the constitutionality of the challenged taxes on the basis of "whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 288. The same approach

[26] *See* U.C.C. § 9-202 (2000).

was followed in *Carbone*, where this Court focused on the fact that the "economic effects [of the flow control law] are interstate in reach" and concluded that "[t]hese economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause." 511 U.S. at 389. From a practical standpoint, it is clear that the "effect" of local flow control laws on interstate commerce is no different when the favored local facility is publicly owned than when it is privately owned. In either case, the "guarantee of a free trade area among States," *ATA*, 483 U.S. at 281, is violated when a local government forces all trash in its jurisdiction to go to a local facility. From the perspective of the out-of-state waste facilities that can no longer compete for trash generated in a particular county or municipality, it is irrelevant whether the local facility that is the beneficiary of the flow control ordinance is owned by a private entity or by the local waste authority. In either event, the "protectionist effect of the ordinance," *Carbone*, 511 U.S. at 392, is the same—the locally generated waste is hoarded for the benefit of the local facility and the out-of-state competitors are shut out of the market.

Similarly, the effect on the local trash haulers is the same, regardless of whether the facility designated by the flow control laws is publicly owned or privately owned. In either case, those haulers who had been hauling trash to out-of-state waste facilities will now have to take that trash to the designated local facility—and pay the higher tipping fee charged by that facility.[27] They too are being deprived of access to the interstate market for solid waste services, contrary to the precepts of the Commerce Clause. Regardless of whether flow control laws favor publicly or privately owned facilities,

[27] As the Second Circuit previously recognized in the case at bar, "[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. at 29a.

the ripple effect of such laws will be felt throughout the interstate transportation industry. A return to flow control will prevent railroads and barges from accessing the interstate market for solid waste services. Railroads and barge lines increasingly are entering into contracts for the long-distance transport of high volumes of trash to out-of-state disposal facilities.[28] By forcing waste to be taken to local facilities, the public-private distinction invented by the Second Circuit will adversely impact those railroads and barges already engaged in, or planning to become engaged in, the interstate transportation of waste by rail and inland waterways, respectively.

The Supreme Court's endorsement of the public-private distinction would affect not only those businesses specifically engaged in the interstate transportation of waste, but the multitude of ordinary businesses that generate waste. Most obviously, the creation of local government monopolies over solid waste disposal will prevent such waste generators from reaping the benefits of a competitive marketplace for disposal services, including the ability to shop for price, quality of service, and indemnification from environmental liability. The Second Circuit's belief that a flow control law forcing trash to go to a publicly owned facility is "less likely to give rise to retaliation and jealousy from neighboring states," Pet. App. at 48a, than one that forces trash to go to a privately owned facility, is simply naïve. The effect on an out-of-state waste facility that is shut out of a market by flow control is the same, regardless of who owns the favored facility, as is the effect on the municipality or county in which that out-of-

[28] For example, the recently approved New York City Solid Waste Management Plan calls for the transport of most of New York City's solid waste by rail or barge, in large part, because such modes of transport will have a lesser adverse impact on the environment. See Department of Sanitation, *Comprehensive Solid Waste Mgmt. Plan* (July 2006) at www.nyc.gov/html/dsny/html/reports/swmp-4oct.shtml.

state facility is located. A local government in a neighboring state that finds its financial well-being jeopardized by the loss of business experienced by its own waste facility is unlikely to eschew "retaliatory" measures simply because the flow control law responsible for its problems is directing waste to a publicly owned, rather than a privately owned, facility. Realistically, each local jurisdiction will act to protect its own interests—including, when necessary, retaliatory measures against other localities. This is precisely what the Commerce Clause was intended to prevent.

IV. WASTE DISPOSAL IS NOT SOLELY A MUNICIPAL FUNCTION

While waste management has historically been "a traditional interest of local government," Respondents' Brief in Opposition at 6, waste disposal is not now, and has never been, exclusively or even primarily a municipal function. The local municipal "dumps" of generations past helped cause the environmental degradation that compelled Congress to enact RCRA and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*. Today, nearly two-thirds of solid waste received at landfills is received at private sector landfills.[29] These modern, heavily regulated[30] and environmentally protective disposal facilities safely manage the majority of the waste generated in the United States. Further, the majority of new modern landfills (or expansions of existing landfills) are being constructed by private companies, not local governments. According to a recently issued survey, eight of the

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[29] Waste News Market Handbook 2005 at 27.

[30] See 40 C.F.R. Part 258 (RCRA Subtitle D regulations). Modern landfills are also regulated under the Clean Air Act. See 40 C.F.R. §§ 60.30c-36c (emission guidelines); 40 C.F.R. §§ 60.750-759 (performance standards); 40 C.F.R. §§ 62.14350-14356; 40 C.F.R. §§ 63.1930-1990 (hazardous air pollutants).

ten largest landfills in the United States are privately owned and operated.[31]

Moreover, to the extent local governments are directly involved in solid waste management at all, that involvement is usually limited to the *collection* of *residential* solid waste (often by municipal sanitation departments). It would be a stretch for Respondents or other local governments to assert that their "traditional" interest in waste management includes the private sector collection and disposal of waste from commercial and industrial generators.

V. THE ASSERTED BENEFITS OF FLOW CONTROL ARE ILLUSORY AND CAN BE ACHIEVED BY OTHER MEANS

Flow control proponents frequently argue that creating local waste disposal monopolies helps achieve important public policy goals. Notwithstanding the immutable fact that under the applicable "virtually per se invalid" standard, these goals do not justify discrimination against interstate commerce, the purported benefits are illusory, and often can be achieved in other ways that do not trample on important constitutional rights. See, e.g., Geoffrey Oberhaus, *The Dormant Commerce Clause Dumps New Jersey's Solid Waste "Flow Control" Regulations: Now What? Possible Constitutional Alternatives to the Current "Flow Control" System*, Vol. 29, No. 2, Rutgers L.J. (1997-98) (suggesting alternatives to flow control).

One argument frequently asserted by flow control advocates, and agreed with by the court below, Pet. App. at 20a, is that by sending solid waste to a government-owned disposal facility, a local government avoids potential environmental liability associated with improper disposal of such waste. On inspection, this argument is flawed. A local government

[31] See Largest Landfills, Waste News (Nov. 6, 2006) at 18.

would not have any Superfund or other liability for waste collected by private haulers disposed of at a private landfill. Further, while in generations past some waste disposal facilities became Superfund sites and waste generators were identified as potentially responsible parties (PRPs), the modern landfills developed in the wake of RCRA do not even remotely resemble the dumps of yesteryear. Finally, the federal government has recognized that it is unfair to impose liability for municipal solid waste in the same manner as for the toxic and hazardous waste frequently disposed at Superfund sites, and has enacted legislation and policies to reduce the potential liability of municipal solid waste generators.[32]

A second argument is that flow control is necessary to encourage recycling. Again, this argument is simply wrong. A federal report conclusively determined that flow control laws are not important for achieving local recycling goals.[33] Moreover, in the years after this Court struck down Clarkstown's flow control law, the national recycling rate has *increased* from 26.1% of the municipal solid waste stream in 1995 to 32.1% percent in 2005.[34] If flow control encouraged recycling, the demise of flow control following *Carbone* suggests that the recycling rate should have declined over the past twelve years.

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[32] See Pub. L. No. 107-118 (Small Business Liability Relief and Brownfields Revitalization Act (2002) (codified at 42 U.S.C. § 9607(p) (creating qualified exemption for certain generators of municipal solid waste); U.S. Environmental Protection Agency, Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites (Feb. 5, 1998).

[33] *Flow Controls and Municipal Solid Waste*, Office of Solid Waste, EPA 530-R-95-008 (March 1995) at ES-5.

[34] See U.S. Environmental Protection Agency, Municipal Solid Waste Generation, Recycling, and Disposal in the United States: Facts and Figures for 2003 at 3 Table 2 (1995 data); U.S. Environmental Protection Agency, Municipal Solid Waste in the United States: 2005 Facts and Figures at 2 Table ES-1 (2005 data).

Further, to the extent that local governments believe that it is important to achieve these goals, there are a variety of other tools that can be used that do not discriminate against interstate commerce. Most obviously, as the Court correctly observed in *Carbone*, local governments can impose fees or taxes to "ensure the long-term survival of the designated facility." 511 U.S. at 394. Alternatively, they can reduce costs, enact uniform safety regulations or take other steps to achieve these purposes. See *U&I Sanitation*, 205 F.3d at 1071; *Lebanon Farms, supra*, at 18.

Finally, local governments generally may favor local waste disposal facilities—if they provide the option for waste to be exported to other states. A number of federal courts have upheld "intrastate" flow control laws that designate specific in-state waste disposal facilities, but allow haulers and others to take waste out-of-state.[35] While these laws create similar inefficiencies to the flow control laws at issue in this case, some courts have found that because they allow for waste to cross state lines, they do not discriminate against interstate commerce. If local governments are going to create local waste disposal monopolies, they should do so in a way that does not trample on the well-established and venerable principles underlying the dormant Commerce Clause.

Flow control allows local governments to avoid competing fairly in the highly competitive marketplace for waste disposal, by discriminating against all potential out-of-state disposal facilities. This inefficiency inexorably leads to higher waste disposal costs for waste haulers and higher waste collection costs for waste generators. The reestablishment of inefficient, local waste disposal monopolies,

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[35] See, e.g., *IESI AR Corp. v. Northwest Ark. Regional Solid Waste Mgmt. Dist.*, 433 F.3d 600 (8th Cir. 2006); *On The Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001).

thought to have been eradicated by this Court little more than a decade ago, should not be countenanced.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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