No. 05-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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 a flow-control ordinance that requires delivery of all solid waste to a publicly owned local facility and thus prohibits its exportation imposes so "insubstantial" a burden on interstate commerce that the provision satisfies the Commerce Clause if it serves even a "minimal" local benefit.

RULE 29.6 STATEMENT

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

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Constitution And Statutes:

TABLE OF AUTHORITIES—continued

Page(s)

Miscellaneous:

PETITION FOR A WRIT OF CERTIORARI

Petitioners 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. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

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

JURISDICTION

The judgment of the Second Circuit was entered on February 16, 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, by a person for collection in accordance herewith, such solid waste and recycla-

> bles 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 App., *infra*, 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 App., *infra*, 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 invalid under the dormant Commerce Clause 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 $1 after five years (the time it was expected to take the private entity to recoup its investment). 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, 142 (1970), which held that an evenhanded regulation "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Adopting an idiosyncratic understanding of the *Pike* test, the court of appeals then ruled 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" (App., *infra*, 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 wherever they are followed, because it is a simple matter for municipalities to structure (or restructure) transactions so that they have record title to the preferred facilities. Moreover, because the rulings conflict with decisions of other Circuits, they create uncertainty about the governing law that will interfere with the establishment of long-term arrangements for solid waste management. The question whether *Carbone* can be circumvented by public ownership of the preferred facilities thus is a recurring issue of great significance that warrants this Court's immediate attention.

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 govern-

ments 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 2d Cir. II J.A. 201.[1]

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"). App., *infra*, 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 * * *." App., *infra*, 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 impris-

[1] Citations to the joint appendix filed in the Second Circuit in *United Haulers I* are designated "2d Cir. I J.A. __." Citations to the joint appendix filed in the Second Circuit in *United Haulers II* are designated "2d Cir. II J.A. __."

onment. *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. 2d Cir. I J.A. 210. 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. App., *infra*, 27a-28a.[2] The contract required the 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. 2d Cir. I J.A. 278, 290. 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." App., *infra*, 28a; 2d Cir. I J.A. 45

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

[2] After the agreement with Empire expired in 1998, Waste Management of New York was selected to operate the transfer station. See Dkt. No. 148, Ex. 30. Under that contract, waste is transported to a landfill in Fairport, New York. See *id.* at 2.

Station. 2d Cir. I J.A. 457-458.[3] At that time, the monopolistic tipping fee at the transfer station was $86 per ton. App., *infra*, 107a; 2d Cir. I J.A. 455. 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." *Id.* at 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. 2d Cir. I J.A. 463, 464; see also *id*. at 429-430, 440-441 ($37 per ton to $55 per ton, including transportation); *id*. at 446-447 ($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 (2d Cir. II J.A. 202), generating revenues of more than $16 million for the Authority annually. See Dkt. No. 148, Ex. 29, at 3.

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.

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[3] Subsequently, the Authority designated two additional transfer stations, a stump disposal facility, and a household hazardous waste facility. See Dkt. No. 148, Ex. 29, at 5.

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.

App., *infra*, 111a.

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

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

Id. at 113a-114a.

Having found the flow-control laws unconstitutional, the district court enjoined their enforcement and referred the

matter to the magistrate judge for determination of damages. *Id*. at 116a. 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" (App., *infra*, 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." App., *infra*, 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 recognized that other courts had struck down flow-control laws that favored publicly owned waste disposal facilities. App., *infra*, 49a-50a. It rejected

those cases, however, on the ground that "their holdings are not binding * * * and have little persuasive value given that the courts did not directly address the issue we decide today." *Id*. at 50a. As for the one case that did directly address the issue—*Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Authority*, 877 F. Supp. 935, 943 (M.D. Pa. 1994)—the court stated: "We * * * respectfully disagree with that decision for the reasons already discussed." *Ibid.*

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 App., *infra*, 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. App., *infra*, 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. App., *infra*, 99a. In the view of the magistrate judge, "[t]he critical inquiry" under *Pike* "is whether an out-of-state business is treated less favorably than one similarly situated but within the state." *Id.* at 95a. Because the Counties' flow-control laws treat "a local private trash business * * * no differently * * * than one situated out of state" (*id.* at 96a), the magistrate judge concluded that there was no need to "proceed to the next step of balancing the burdens against

the putative benefits associated with the legislation." *Id.* at 99a.

Over plaintiffs' objections, the district court adopted the Report and Recommendation in its entirety. App., *infra*, 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." App., *infra*, 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 marketplace for waste processing services, a result which tradition-

ally 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." App., *infra*, at 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" *(id.* at 18a) and to enable "states and municipalities to exercise their police powers without undue interference from the laws of neighboring jurisdictions" (*ibid.*). 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*. App., *infra*, 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.

REASONS FOR GRANTING THE PETITION

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.

The Second Circuit's ruling that there is a "public facilities" exception to *Carbone* is flatly at odds with a recent decision of the Sixth Circuit, which expressly rejected the reasoning of the decision below and invalidated flow-control regulations exactly like those at issue here. The pointed disagreement between these two courts clearly will not be resolved without this Court's intervention. Unless this Court grants certiorari, moreover, the existing circuit conflict will spread as other courts have the opportunity to address both the flow-control provisions that have already been adopted in the decision's wake and the additional provisions that will surely be adopted if the decision becomes final.

Unless other courts are quick to reject the Second Circuit's position—thus confining this form of flow control to one region—the eagerness of many localities to hoard demand for waste processing services will lead to the "pervasive flow control" that Justice O'Connor feared would "severely impair[]" the interstate market in waste services. At the same time, the constitutionality of these provisions will remain in doubt, threatening to upend the arrangements and expectations of both public and private entities engaged in waste management activities. The prospect that this form of flow control will spread is unfortunate, because the decision below is inconsistent with *Carbone* itself and with other important strands of this Court's dormant Commerce Clause jurisprudence.

The lower court's ruling that the flow-control laws satisfy the *Pike* test is also problematic. Having decided that the flow-control laws should not be invalidated as discriminatory, the court of appeals purported to apply the balancing

analysis applicable to even-handed regulations that incidentally burden interstate commerce. But the court put a heavy thumb on the scale when it evaluated whether the burdens associated with respondents' flow-control laws outweigh the putative local benefits. Although the court acknowledged that the flow-control laws erect a trade barrier that blocks exportation of demand for waste processing services, it deemed that burden "insubstantial" (App., *infra*, 18a) because it "does not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (*id.* at 15a-16a).

The Second Circuit's ruling that *Pike* applies meaningfully only if there is a "differential" burden on out-of-state entities has been adopted by the Fifth Circuit but conflicts with decisions of other circuits and this Court. Because no regulation will ever be invalidated under the *Pike* test where this rule is followed, the decision below merits review.

I. THE SECOND CIRCUIT'S PUBLIC-PRIVATE DISTINCTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND UNJUSTIFIABLY LIMITS *CARBONE*

A. The Second Circuit's Approach Has Been Rejected By The Sixth Circuit And Is In Tension With Decisions Of Several Other Circuits.

A recent decision of the Sixth Circuit squarely conflicts with the decision below. In *National Solid Waste Management Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006), the court assessed the constitutionality of a flow-control provision requiring all waste generated within Daviess County, Kentucky, to be deposited at facilities owned by the County. Applying *Carbone*, the court found there to be "little doubt" that the provision "discriminates against interstate commerce." *Id.* at 905. "By forcing [plaintiffs] to use Defendant's disposal and transfer facilities," the court held, "the Ordinance would prohibit these members from using other in-

state and out-of-state facilities" and hence was "facially discriminatory against out-of-state interests." *Ibid.*

The Sixth Circuit expressly "decline[d] to adopt" the "private-public ownership distinction" recognized by the Second Circuit in *United Haulers I*. *Id.* at 909. It noted that it had "already found dormant Commerce Clause violations in cases where the facility was publicly owned." *Id.* at 910.[4] Moreover, it "respectfully disagreed" with the Second Circuit's view that the public-private distinction could be squared with *Carbone.* The court pointed out that this Court's focus in *Carbone* "was on the harm to out-of-state businesses and the local market, as opposed to the benefit conferred to the local provider." *Id.* at 910-911. As the court observed, "this harm would occur regardless of who owned the benefited facility." *Ibid.* The Sixth Circuit further noted that Clarkstown's transfer station was "quite clearly owned in fact by the municipality" (*id.* at 912)—permitting the inference that this Court, in striking down Clarkstown's flow-control ordinance, had "implicitly rejected the public-private distinction." *Ibid.*

Like the Sixth Circuit in cases preceding *Daviess*, the Third and Eighth Circuits have held that flow-control provisions favoring publicly owned facilities are discriminatory. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794, 809-810 (3d Cir. 1995) (two of the three designated facilities in one of two consolidated cases were publicly owned; case remanded for determination of whether process

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[4] See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-716 (6th Cir. 2000) (ordinance requiring all waste to be processed at county-owned transfer station discriminated against interstate commerce); *Waste Mgmt., Inc. v. Metropolitan Gov't*, 130 F.3d 731, 733, 736 (6th Cir. 1997) (striking down flow-control ordinance that required all residential waste to be disposed of at publicly owned facility).

of designating facilities was discriminatory); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995) (holding that New Jersey regulations requiring flow control discriminated against interstate commerce, and making no distinction based on whether preferred facility is publicly or privately owned); *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1383 (8th Cir. 1993) (striking down ordinance that required all waste to be delivered to facility owned by waste district); see also *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993) (striking down flow-control ordinance that required all waste to be disposed of at publicly owned facility), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994); *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct. App. 1997) (affirming order striking down ordinance that required recyclables to be delivered to County-owned processing facility). Although these decisions "d[o] not directly address the public-private ownership issue raised by *United Haulers*," they carry the "necessary implication * * * that public ownership did not change the dormant Commerce Clause inquiry." *Daviess*, 434 F.3d at 910.[5]

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[5] A federal district court in Mississippi also held that a flow-control ordinance favoring a publicly owned facility was unconstitutional after expressly rejecting the reasoning of *United Haulers I*. See *Nat'l Solid Waste Mgmt. Ass'n. v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644, 649-650 (S.D. Miss. 2003), rev'd in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004). The Fifth Circuit held that the plaintiffs lacked standing to claim that the ordinance was discriminatory, thus leaving for another day the question whether the ordinance is invalid under *Carbone*. See 389 F.3d at 500. In contrast, a district court in Florida relied on *United Haulers I* as grounds for upholding a flow-control measure favoring public facilities. See *East Coast Recycling, Inc. v. City of Port St. Lucie*, 234 F. Supp. 2d 1259, 1267 (S.D. Fla. 2002).

B. The Decision Below Is Inconsistent With This Court's Commerce Clause Decisions.

1. The decision below conflicts with *Carbone.*

In *Carbone*, this Court rejected the notion that flow control is permissible when the designated facility is publicly owned. The decision below therefore conflicts with *Carbone*.

1. *Carbone* involved an ordinance that required that all solid waste within the defendant town's borders be brought for processing to a particular 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 $1. 511 U.S. at 387. The town guaranteed that the facility would receive a minimum of 120,000 tons of waste annually and authorized the contractor to charge a tipping fee of $81 per ton, a rate that exceeded the market rate. *Ibid*. "The object of this arrangement was to amortize the cost of the transfer station: The town would finance its new facility with the income generated by the tipping fees." *Ibid*.

This Court held that, because the town's flow-control ordinance "attains this goal by depriving competitors, including out-of-state firms, of access to a local market, * * * the flow control ordinance violates the Commerce Clause." *Id*. at 386. It explained that, in this context, "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Id*. at 391. "With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town." *Ibid*.

The Court saw the challenged flow-control ordinance as "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. Having found the ordinance to discriminate against interstate commerce, the Court determined that flow control was not the least discriminatory means of achieving any legitimate local interest (*id*. at 392-394) and accordingly held that the ordinance violated the Commerce Clause.

Justice O'Connor concurred in the judgment. In her view, the flow-control ordinance did not discriminate against interstate commerce because "the garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal." *Id*. at 404. She nevertheless concluded that the ordinance failed the *Pike* balancing test. She explained that, in ascertaining the burden on commerce, it is necessary to consider "what effect would arise if not one, but many or every, jurisdiction adopted similar legislation." *Id*. at 406 (internal quotation marks and brackets omitted). She observed that "pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." *Ibid*. She therefore concluded that "the burden [the challenged ordinance] imposes on interstate commerce is excessive in relation to [the town's] interest in ensuring a fixed supply of waste to supply its project." *Id*. at 407.

Justice Souter (joined by the Chief Justice and Justice Blackmun) dissented. The dissenters believed that the majority had "underestimate[d] or overlook[ed]" "both analytical and practical differences between this and the earlier [local] processing cases" that "should prevent this case from being decided the same way." *Id*. at 416. Specifically, they argued, ***"the one proprietor * * * favored [by the challenged flow control ordinance] is essentially an agent of the mu-***

nicipal government * * *. Any discrimination worked by [the ordinance] thus fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist." *Ibid*. (emphasis added). The dissenters further explained:

> While our previous local processing cases have barred discrimination in markets served by private companies, ***Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership.*** * * * The majority ignores this distinction between public and private enterprise, equating [the ordinance's] "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms. * * * Reasons other than economic protectionism are * * * more likely to explain the design and effect of an ordinance that favors a public facility. * * * ***An ordinance that favors a municipal facility, in any event, is one that favors the public sector***, and if we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position, then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Id. at 419-421 (emphasis added; internal quotation marks, citations, and footnote omitted). The dissenters concluded that the ordinance should be upheld because it "conveys a privilege ***on the municipal government alone***, the only market participant that bears responsibility for ensuring that ade-

quate trash processing services continue to be available to Clarkstown residents." *Id*. at 430 (emphasis added).

2. The Second Circuit's assertion that this Court did not already consider and reject the public/private distinction in *Carbone* is untenable. That distinction was the centerpiece of a vigorously argued dissent. Obviously aware of this central contention of the dissent, the Court nonetheless stated that, "having elected to use the open market to earn revenues for ***its*** project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." *Id*. at 394 (emphasis added). This Court thus evidently (and, quite correctly, under the circumstances) regarded the fact of ownership as a formality: as the dissent itself contended, for all practical purposes, the transfer station was "essentially a municipal facility" (*id*. at 419), which was to be formally transferred to the town the following year. If the Court had intended its holding to preclude the flow-control ordinance only for the year until the town was to receive record title to the facility, it surely would have said so.

Moreover, the core reasoning of the majority opinion applies fully regardless of the identity of the owner of the preferred facility. As the Court observed:

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

Id. at 390. Local processing laws run afoul of this "central rationale" because "they bar the import of the processing service." *Id*. at 392. Specifically, the challenged flow-control ordinance impermissibly discriminated because "it allow[ed] only the favored operator to process waste that [was] within the limits of the town." *Id*. at 391.

Whether the owner of the preferred facility is a private business or a public entity, a flow-control law, by "allow[ing] only the favored operator to process waste that is within the limits of the town," constitutes "economic protectionism" of that preferred local facility and threatens to result in "retaliatory measures." See *id.*; see also *Daviess*, 434 F.3d at 911 (concerns about "aiding local enterprise at the expense of rival businesses * * * remain regardless of whether the municipality owns the favored business"). Indeed, as discussed further below, if the Second Circuit's public-private distinction is left standing, it is predictable that municipalities around the country will take advantage of the ruling to establish (or revive) their own flow-control laws, with the result being that interstate commerce in the service of waste processing will be dramatically impeded.

2. The decision below is irreconcilable with this Court's renunciation of the use of formalistic distinctions in resolving Commerce Clause challenges.

Under the Second Circuit's decision, the validity of flow control turns almost entirely on the identity of the record title owner of the preferred facility. If legal title to a facility is in the name of a private entity, a law requiring that waste be delivered to that facility is subject to the Court's virtually *per se* rule of invalidity. If legal title to a facility is in the name of a public entity—even if constructed and operated by a private entity—the very same law would be evaluated under the more deferential *Pike* test. The effect of the law on interstate commerce is precisely the same, yet the result couldn't be more different.

The Second Circuit's decision, in short, exalts form over substance. In so doing, it deviates markedly from this Court's modern Commerce Clause jurisprudence, which has steadfastly "eschewed formalism" in favor of "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Cream-*

ery, Inc. v. Healy, 512 U.S. 186, 201 (1994). See also *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("[w]e seek to avoid formalism and to rely upon a consistent and rational method of inquiry") (internal quotation marks omitted). For example, during the middle part of the twentieth century, the Court drew a distinction between taxes on the privilege of engaging in interstate commerce and taxes on the privilege of using a state's highways, holding the former unconstitutional and the latter permissible. Later, however, the Court renounced this distinction as "a triumph of formalism over substance" (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977)) that "allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology'" (*Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto*, 430 U.S. at 281)).

The public-private distinction embraced by the Second Circuit is a throwback to the formalism that this Court has renounced. Review is warranted to bring the Second Circuit back in line with what the Court has determined to be the appropriate focus: "whether the [challenged law] produces a forbidden effect" (*Complete Auto*, 430 U.S. at 288).

3. The decision below is in tension with this Court's "market participant" cases.

This Court's "market participant" doctrine provides that the strictures of the dormant Commerce Clause do not apply when a state or local government "is acting as a market participant, rather than as a market regulator." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (plurality op.). This doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. To the contrary, the doctrine "allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The

State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *Ibid*.[6]

Here, the market-participant doctrine plainly does not immunize respondents' laws requiring that waste collected by private haulers within the boundaries of Oneida and Herkimer Counties be brought to the Authority's facilities for processing and/or disposal. Indeed, the Second Circuit so recognized. See App., *infra*, 36a. Yet in holding that respondents' ownership of the favored facilities renders the flow-control laws non-discriminatory, the Second Circuit has given state and local governments the very *carte blanche* this Court has denied them under the market-participant doctrine. If the Second Circuit's decision is allowed to stand, state and local governments could be emboldened to enter any number of markets and then use their regulatory powers to favor themselves over their private interstate competitors.

Although such self-dealing would not entirely be immunized from scrutiny under the dormant Commerce Clause, the notion that it need only survive the *Pike* balancing test is in significant tension with the Court's strongly expressed concern that the market-participant doctrine not "swallow[] up the rule that States may not impose substantial burdens on

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[6] It merits mention that, in the case in which the Court first recognized the market-participant doctrine, the Court found it significant that "the commerce affected by the [challenged law] appears to have been created, in whole or in substantial part, by the [overall program of which the challenged law was a part]." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 n.18 (1976). See also *id.* at 815-816 (Stevens, J., concurring). The present case presents the flip side of this situation: commerce in processing services and recyclables pre-dated respondents' entry into the waste processing business and, by fiat, respondents have arrogated to themselves all of that pre-existing commerce.

interstate commerce even if they act with the permissible state purpose of fostering local industry." *South-Central Timber*, 467 U.S. at 98 (plurality op.).

C. The Issue Presented Is Important And Should Be Resolved Now.

The circuit conflict regarding the constitutionality of flow-control provisions that favor public facilities should be resolved without delay. Since *United Haulers I*, it has been an open question whether other courts would adopt the Second Circuit's reasoning. The Sixth Circuit's decision to reject the Second Circuit's approach has now made it clear that the courts will be divided on this issue until this Court takes up the matter. The Court should do so without delay because having a stable and uniform rule regarding the legality of flow control is essential.

Since *Carbone*, many flow-control provisions have been held unconstitutional.[7] States and local governments across the country, however, nevertheless remain eager to adopt flow control. See Brief Amicus Curiae of the Bristol Resource Recovery Operating Committee, *et al.*, filed in *United Haulers II*, at 2 (group of local governmental entities contend that "flow control is integral to fulfilling" their responsibili-

[7] See, *e.g.*, *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000); *Ben Oehrleins & Sons & Daughter v. Hennepin County*, 115 F.3d 1372, 1384-1385 (8th Cir. 1997); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, 1996 WL 612465, at *1-*3, *10 n.13 (D. Minn. July 2, 1996); *Southcentral Pa. Waste Haulers Ass'n*, 877 F. Supp. at 943; *Empire Sanitary Landfill, Inc. v. Commonwealth of Pennsylvania*, 684 A.2d 1047, 1056 (Pa. 1996).

ties for solid waste management).[8] If the decision below stands, therefore, it seems clear that many local governments outside the Sixth Circuit that own (or can assume ownership of) waste processing facilities will impose flow control in the hope that the Second Circuit's approach ultimately will become the law of the land. Indeed, some have already done so. See *id.* at Appendix A (several governmental entities appearing as *amici curiae* in *United Haulers II* state that they have adopted flow control since *United Haulers I* was decided); see also *Pine Belt*, 261 F. Supp. 2d at 649-650 (assessing constitutionality of Mississippi flow-control ordinance adopted following *United Haulers I*). In addition, the local governments that have, in an effort to satisfy *Carbone*, exempted from their flow-control laws waste destined for out-of-state disposal may be emboldened to eliminate the exemptions.[9]

Although ordinances directing waste to publicly owned facilities undoubtedly would become commonplace if this Court denies certiorari, it would remain unsettled whether such arrangements are constitutional. Until this Court addresses the matter, each Circuit will, in turn, have to decide

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[8] As of 1995, at least 39 states and the District of Columbia had authorized localities to impose flow control. See United States Environmental Protection Agency, Report to Congress: *Flow Controls and Municipal Solid Waste* II-1 to II-5 (Mar. 1995)

[9] These provisions generally have been upheld. See, *e.g.*, *IESI AR Corp. v. Northwest Arkansas 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); *Ben Oehrleins*, 115 F.3d at 1385-1387; *Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist.*, 1995 WL 253121 (S.D. Ohio Mar. 7, 1995). But see *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017, 1023 (D. Minn. 1999) (intrastate flow-control ordinance unconstitutionally burdened interstate commerce).

whether or not to follow the Second Circuit or the Sixth Circuit, and each decision will only deepen the existing circuit split.[10] In the Second Circuit and in any other jurisdiction that embraces the public-private distinction, public authorities would have no certainty that this Court will not ultimately reject that distinction, putting their entire waste-management schemes in jeopardy. Conversely, in Circuits that reject the public-private distinction and strike down flow-control ordinances under *Carbone*, private businesses would continue to labor under a cloud of uncertainty as to whether, in the end, their contracts will be undermined as a result of a future decision of this Court embracing that distinction. To eliminate this uncertainty and to avoid the unnecessary disruption of public and private expectations, the question presented here should be resolved now.

II. THE SECOND CIRCUIT'S CONSTRUCTION OF *PIKE* CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT

A. The Holding That Flow Control To A Government-Owned Facility Imposes Only An "Insubstantial" Burden On Interstate Commerce Conflicts With Decisions Of Other Circuits.

The Second Circuit has repeatedly ruled that a nondiscriminatory regulation need not be put through the *Pike* balancing test unless the putative burden on interstate commerce "is ***qualitatively or quantitatively different from that imposed on intrastate commerce.***" *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 217 (2d Cir. 2004) (citations omitted) (emphasis added). This reading of the *Pike* test was imple-

[10] As noted above, this issue was presented to the Fifth Circuit in *Pine Belt*, but it concluded that the plaintiffs lacked standing to contend that the flow-control provision was discriminatory. See note 5, *supra*.

mented here: although the court ostensibly declined to decide whether respondents' flow-control laws impose a cognizable burden on interstate commerce, it held that any such burden is "insubstantial" or "slight" because it does not fall differentially on any particular out-of-state entity.

The Fifth Circuit has applied the Second Circuit's construction of *Pike* to facts nearly identical to those here. In *National Solid Waste Management Ass'n v. Pine Belt Regional Solid Waste Management Authority*, 389 F.3d 491 (5th Cir. 2004), the court evaluated the constitutionality of flow-control ordinances requiring delivery of waste to facilities owned by the regional waste management authority. The court held that the plaintiffs lacked standing to pursue their claim that the ordinances were facially discriminatory (*id.* at 500), but reached the merits of their claim that the regulation excessively burdened interstate commerce (*id.* at 501). The court held that, because the ordinances did not have a "disparate impact on interstate commerce," they "ha[d] not imposed any incidental burdens on interstate commerce" and therefore passed the *Pike* test. *Id.* at 502 (quoting *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys. Inc.*, 155 F.3d 59, 75 (2d Cir. 1998)).

In contrast to the Second and Fifth Circuits, the Fourth, Eighth, Sixth, and Tenth Circuits have applied *Pike* to invalidate evenhanded state laws that impose burdens on interstate commerce that exceed their benefits—even when those laws do ***not*** impose greater burdens on out-of-state interests.

The most analogous case is *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000). There, the Eighth Circuit addressed a municipal flow-control ordinance that was otherwise very similar to the respondents' flow-control laws, but did not apply to waste "destined for out-of-state disposal." *Id.* at 1065. For this reason, the court of appeals concluded that the ordinance did "***not*** overtly discriminate against interstate commerce on its face, in its purpose, or

through its effects." *Id*. at 1069 (emphasis added). Although there was no suggestion of any "disparate impact" on out-of-state interests, the Eighth Circuit engaged in the balancing analysis mandated by *Pike* and invalidated the challenged ordinance because "the local interests that it serves do not justify the burden that it imposes upon interstate commerce." *Ibid*. The court found that the ordinance did little to advance local interests and that the municipality had alternative means to accomplish its purposes that would impose less of a burden on interstate commerce. See *id*. at 1069-1072. Particularly given the possibility that other localities might adopt similar flow-control restrictions, the court explained that "the ordinance's interference with interstate commerce is 'clearly excessive' in relation to [its] local benefits." *Id*. at 1072; see also *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 735, 736 (8th Cir. 2002) (invalidating challenged law under *Pike*, despite absence of evidence that the law had a "discriminatory effect" or "places out-of-state distributors at a competitive disadvantage," because "there is clearly a burden [on interstate commerce] substantial enough to outweigh the *de minimis* putative local benefit of the law").

The Fourth, Sixth, and Tenth Circuits have used a similar analysis in striking down (or reversing district court judgments upholding) state laws even though those laws did not impose a competitive disadvantage on out-of-state commercial interests. See *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (even if challenged regulation of Internet were construed to reach only in-state web sites or sites having substantial contact with the regulating state, regulation is invalid under *Pike* "because the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers") (alternative holding);[11] *McNeilus Truck & Mfg.*,

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[11] See also *Chambers Med. Techs., Inc. v. Bryant*, 52 F.3d 1252, 1261 (4th Cir. 1995) (applying *Pike* test where challenged law

Inc. v. Ohio, 226 F.3d 429, 444 (6th Cir. 2000) (even if statute is deemed to be nondiscriminatory, "the lack of any significant local benefit that does not already exist means that the State * * * could not demonstrate that the benefits of the statute outweigh even an incidental burden on interstate commerce posed by the [challenged law]") (alternative holding); *Blue Circle Cement, Inc. v. Board of County Comm'rs*, 27 F.3d 1499, 1511-1512 (10th Cir. 1994) (agreeing with district court that challenged ordinance "regulates evenhandedly" and "confers no advantages on in-state entities," but reversing and remanding because lower court failed to apply *Pike* test); *A.C.L.U. v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (striking down non-discriminatory law under *Pike* balancing test) (alternative holding).

The Tenth Circuit, moreover, has ***expressly*** rejected the notion that "the only inquiry is whether the statute imposes a different burden on interstate commerce." *Dorrance v. McCarthy*, 957 F.2d 761, 764 (10th Cir. 1992). As it explained, that "argument is not only circular, but it completely misstates the *Pike* analysis. By definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce." *Ibid.*

B. The Decision Below Misconstrues The *Pike* Test.

This Court never has indicated that a "differential" burden on out-of-state entities is any part of the *Pike* test. Quite the contrary: the *Pike* balancing of benefit and burden comes into play only when a state rule "regulates ***even-handedly***" and thus has "only incidental" effects on interstate commerce. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (quoting *Pike*, 397 U.S, at 142) (emphasis added); see also *Brown-Forman Distillers Corp. v. New York State Liquor*

"regulate[d] evenhandedly and ha[d] only incidental effects on interstate commerce").

Auth., 476 U.S. 573, 579 (1986). When a state law ***does*** have a differential impact on in-state and out-of-state entities, it is deemed to have the "practical effect of * * * discriminating" against interstate commerce, and it is subject, ***not*** to the *Pike* test, but to the rule of virtual *per se* invalidity that governs discriminatory state regulations. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-351 (1977); see, *e.g.*, *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 281 (1987) (state tax that has a discriminatory effect will be struck down even if it does "not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory").

Perhaps the clearest statement of this principle can be found in Justice O'Connor's concurring opinion in *Carbone*. Justice O'Connor concluded that Clarkstown's flow-control ordinance did not discriminate against interstate commerce because it "does not give more favorable treatment to local interests as a group as compared to out-of-state or out-of town economic interests." 511 U.S. at 404. In her view, however, this finding of non-discrimination "[did] not * * * end the Commerce Clause inquiry." *Id.* at 405. As she pointed out, "[e]ven a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred." *Ibid.* Undertaking the balancing required under *Pike*, Justice O'Connor concluded that Clarkstown's flow-control ordinance was invalid because the burdens it imposed were excessive in relation to the local interests served by the ordinance. See *ibid.*

Justice O'Connor expressly rejected any notion that the flow-control law satisfied the Commerce Clause merely because it applied equally to in-state and out-of-state businesses, observing that this Court has "long recognized that 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to * * * the people of the State enacting such statute.'" *Ibid.* (quoting *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891)).

Even through evenhanded regulation, "'a State consistently with the Commerce Clause cannot put a barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce * * * among the several States.'" *American Trucking Assn's, Inc.*, 483 U.S. at 281 n.12 (quoting *Nippert v. City of Richmond*, 327 U.S. 416, 425-426 (1946)); see also, *e.g.*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (invalidating truck-length regulation because it "impose[s] a substantial burden on the interstate movement of goods"); *Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) ("state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must * * * bow"); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945) (striking down train-length restriction that "materially restrict[ed] the free flow of commerce across state lines").

Respondents' flow-control laws create just such a "barrier * * * to bar out trade from other States" (*American Trucking Ass'ns, Inc*, 483 U.S. at 281 n.12), yet the court of appeals found the burden on interstate commerce to be "slight" (App., *infra*, 18a). It also failed to consider the impact on the interstate market if other localities were to adopt similar provisions. As Justice O'Connor observed in her concurring opinion in *Carbone*, if that occurs, "the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." 511 U.S. at 406. For this reason as well, review is both warranted and necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX