

No. 04-13035-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SOUTHERN WASTE SYSTEMS, LLC,

Plaintiff-Appellee,

v.

CITY OF DELRAY BEACH, FLORIDA and
WASTE MANAGEMENT INC. OF FLORIDA

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

The following is a complete list of the trial judge(s) and all attorneys, persons, associations of persons, firms, partnerships, and corporations that have an interest in the outcome of this case:

1. Lawrence E. Brownstein
2. The City of Delray Beach, Florida
3. Steven M. Goldsmith
4. Brian Hole
5. Holland & Knight LLP
6. Mayer, Brown, Rowe & Maw LLP
7. Miriam R. Nemetz
8. Kenneth L. Ryskamp, United States District Court Judge
9. Southern Waste Systems, LLC
10. Evan M. Tager
11. Waste Management Holdings, Inc.
12. Waste Management Inc.
13. Waste Management Inc. of Florida
14. Ann E. Vitunac, U.S. Magistrate Judge

STATEMENT REGARDING ORAL ARGUMENT

The district court's order granting summary judgment to plaintiff under the dormant Commerce Clause rests on a patent misunderstanding of the applicable jurisprudence and conflicts with decisions of the First Circuit, the Eighth Circuit, and the California Court of Appeal. Because the issue is one of first impression in this Circuit, however, and because the constitutionality of a local ordinance is at issue, Defendants respectfully submit that oral argument is warranted and would be of assistance to the Court in the resolution of this appeal.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. The district court entered final judgment and issued an injunction on May 12, 2004. Doc 130. Defendants filed a timely notice of appeal on June 10, 2004. Doc 132. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether an exclusive waste collection franchise that is awarded pursuant to an open and non-discriminatory bidding process and that places no geographic limitations on the processing or disposal of waste nonetheless violates the Commerce Clause if the franchisee is paid by consumers of its services rather than by the municipality.

STATEMENT OF THE CASE

Nature Of The Case And Proceedings Below

Southern Waste Systems, LLC (“SWS”), which is in the business of collecting and disposing of construction and demolition debris (“C&D”) in Florida, filed this action against the City of Delray Beach, Florida (“the City”) and BFI Waste Systems of North America, Inc. (“BFI”). The complaint challenged an agreement between the City and BFI and an implementing ordinance giving BFI the exclusive right to collect C&D within the City. Doc 28. SWS asked the court to declare that the exclusive franchise violated the Commerce Clause of the U.S. Constitution and to enjoin its enforcement. *Id.* at 4-5. SWS also requested

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declaratory and injunctive relief for violation of the Equal Protection Clause (*id.* at 5-6), and sought damages under 42 U.S.C. § 1983 (*id.* at 6-7). After Waste Management Inc. of Florida (“WM”) purchased various assets of BFI and was assigned the exclusive franchise, WM was substituted for BFI as a defendant. Doc 84.

The district court granted partial summary judgment to SWS on its claim for injunctive and declaratory relief under the Commerce Clause. Doc 123. After entering a stipulated dismissal of SWS’s remaining claims (Doc 126) and dismissing the City’s counterclaim (Doc 128), the court entered final judgment and enjoined enforcement of the portions of the agreement and ordinance pertaining to C&D. Doc 131. Defendants filed a timely notice of appeal. Doc 132.

Statement Of The Facts

1. ***The C&D Franchise Agreement and Ordinance.*** In 2001, the City of Delray Beach issued a request for proposal (“RFP”) seeking a single contractor to provide comprehensive waste collection services within the City. Doc 110 - Ex.
2. The RFP provided that the successful bidder would become the exclusive provider of residential waste collection services, residential waste recycling services, and commercial waste collection services throughout the City. Doc 110 -

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Ex. 2, STC-3, at 11. The agreement was to have an initial term of five years. Doc 110 - Ex. 2, STC-3, at 1.

The RFP also specified that the winning contractor would be the exclusive provider of “Roll-off Collection Service.” Doc 110 - Ex. 2, STC-3, at 11. “Roll-off Collection Service” was defined to include:

the collection of C&D only roll-off containers, or the Collection of C&D by other mechanical means, within temporary locations in the Service Area, limited to new construction sites and remodeling or refurbishment sites.

Doc 110 - Ex. 2, STC-3, at 8. Accordingly, as the district court found, “it is clear that the specifications stated that roll-off collection services would be exclusive to the contractor and that the contract defined roll-off collection to include C&D.” Doc 123 – Pg 3.

Local firms enjoyed no preference or advantage in the bidding and selection process. Doc 116 - ¶ 6. Five waste companies, including BFI – a non-Florida corporation (Doc 28 - ¶ 3) – submitted bids. Doc 117 - Ex. D. SWS lacked the capacity to provide the full range of services specified in the RFP and did not submit a bid. Doc. 100 - ¶ 6; Doc 123 - Pg 3. Following a public hearing, the City awarded the contract to BFI, the lowest bidder. Doc 114 - ¶ 5; Doc 116 - ¶ 7.

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On September 20, 2001, the City and BFI entered into a contract entitled “Solid Waste, Vegetative Waste and Recycling Collection Franchise Agreement” (the “Agreement”). Doc 110 - Ex. 4. Consistent with the RFP, the Agreement provided that, for a term of five years, BFI would be the exclusive provider of waste collection services, including roll-off collection service for C&D, in the City. Doc 110 - Ex. 4, at 1, 7. The Agreement stated that, when BFI provided roll-off service, it would directly bill and collect payment from the customer, and then transmit a 5% franchise fee to the City. Doc 110 - Ex. 4, at 7, 23. The Agreement did not say where BFI was to take C&D for processing or disposal.

In June 2002, the City adopted Delray Ordinance 15-02 (“the Ordinance”), which codified certain provisions of the Agreement. Doc 116 - ¶ 9. The Ordinance made it unlawful for anyone other than the City or its contractors to provide roll-off containers for waste within the City. It stated:

The governmental function of collection, removal, and disposition of all rolloff containers and refuse within the municipal limits of the City is exclusively vested in the municipal government of the City or its contractors, and all other individuals, persons, firms, or corporations are specifically and expressly prohibited from engaging in that practice or business within the corporate limits of the City and from utilizing the publicly dedicated streets, alleys and other thoroughfares for those purposes.

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Doc 110 - Ex. 3, at 7. It further provided that, when roll-off containers are used at a construction or demolition site, “they shall be obtained from the City’s Contractor.” *Id.* at 8.

The Ordinance also set forth the rates for collection of commercial waste, including the roll-off containers used to collect C&D. *Id.* at 13. It stated that the City’s contractor “shall bill commercial customers the appropriate fees” set forth in the Ordinance “with a franchise fee as determined by the city added.” *Id.* at 15. The contractor was required by the Ordinance “to remit all franchise fees to the City on a monthly basis.” *Id.*

In September 2003, defendant-appellant WM purchased certain assets of BFI and assumed BFI’s rights and obligations under the Agreement and Ordinance. *See* Doc 110 - Ex. 5. WM thus became the exclusive provider of C&D roll-off services in the City. Like BFI, WM billed and collected payments from C&D customers, transmitting a 5% franchise fee to the City. Doc 110 - Pg 28-29. Rates for the provision and collection of C&D roll-off containers were set by the Ordinance (Doc 110 – Pg 24-25), but the City did not control where WM took the C&D for processing or disposal. Doc 110 – Pg 25-26; Doc 100 - ¶¶ 26-27.

2. *The Decision Below.* SWS sued the City and BFI (later WM) after a customer to which it had supplied roll-off services for C&D was cited for violating

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the Ordinance. Doc 123 - Pg 4. SWS challenged the Agreement and Ordinance only insofar as they applied to C&D. Doc 99 - Pg 1-2. The district court granted summary judgment to SWS on its dormant Commerce Clause claim and enjoined the C&D provisions of the Agreement and Ordinance. Doc 131.

In its order granting summary judgment, the district court began its analysis by outlining the well-established test for assessing governmental action under the dormant Commerce Clause. The first question, it observed, is whether the governmental entity involved is acting as a market participant or a market regulator. Doc 123 – Pg 6. If the governmental entity is acting as a market participant, its conduct is not subject to the strictures of the Commerce Clause. If, however, the government is “a market regulator, the Court next asks whether the regulation discriminates against interstate commerce.” *Id.* If so, then the regulation is “*per se* invalid unless the entity ‘can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.’” *Id.* (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392, 114 S. Ct. 1677, 1683 (1994)). “On the other hand, if the regulation does not discriminate, the court inquires whether ‘the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” *Id.* at 7 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847 (1970)).

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The district court ruled that Delray Beach was acting as a regulator, not a market participant, when it made WM the exclusive provider of C&D within the City. Doc 123 - Pg 8-9. Accordingly, the court proceeded to consider “whether the agreement and ordinance are discriminatory.” *Id.* at 10. The court found that the “Plaintiff has neither alleged nor shown that Defendants prohibited any non-local entities from bidding” for the franchise. *Id.* It was also undisputed that the City does not require its contractor to use a local facility for the processing or disposal of C&D. *Id.* at 7. Nevertheless, the court ruled that the City’s grant of an exclusive franchise for C&D collection constituted discrimination against interstate commerce because “it favors one hauler over others without eliminating the market entirely.” *Id.* at 12-13.

The district court expressly rejected (Doc 123 - Pg 11) the First Circuit’s conclusion in *Houlton Citizens’ Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), that a municipality’s grant of an exclusive waste collection franchise to a single contractor raises “no cause for constitutional concern” so long as “in-state and out-of-state bidders are allowed to complete freely [for the franchise] on a level playing field.” *Id.* at 188. In the district court’s view, even when a municipality “provid[es] an open bidding process” (Doc 123 – Pg 11), it may not properly require its residents to use a single waste hauler unless it “has eliminated

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the market entirely” by providing waste services to its residents using public funds. *Id.* at 12. Citing *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282 (2d Cir. 1995), the court concluded that the City of Delray Beach had *not* eliminated the market, because the contractor, rather than the City, billed and collected payment from C&D generators. Doc 123 - Pg 13 .

Having found discrimination against interstate commerce, the district court held that the Ordinance was “*per se* invalid” unless the defendants could “show that the City has no less restrictive alternatives to further its stated interest.” *Id.* The court paid scant attention to the defendants’ evidence that the C&D franchise served the City’s interest in “safety, sanitation, reliable garbage service, [and] cheaper service to residents.” *Id.* It focused instead on the City’s supposed interest in “taking over the waste collection market.” *Id.* According to the district court, the defendants had failed to show “that the current billing practice under the ordinance is the least restrictive means of taking over the waste collection market.” *Id.* at 14. Accordingly, it concluded that “[b]oth Ordinance 15-02 and the exclusive franchise agreement between the Defendants are in violation of the Commerce Clause,” and it enjoined the defendants “from enforcing the C&D portions of that agreement and ordinance.” *Id.*

Statement Of The Standard Of Review

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This Court reviews a district court’s grant of summary judgment <i>de novo</i> . <i>Pennington v. City of Huntsville</i> , 261 F.3d 1262, 1265 (11th Cir. 2001). Summary judgment is appropriate when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In ruling on the propriety of summary judgment, the Court views the facts and inferences in the light most favorable to the non-moving party. <i>Pennington</i> , 261 F.3d at 1265.	

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The City of Delray Beach has decided to put the collection of C&D in the hands of a single company, selected through a competitive bidding process. In awarding the exclusive franchise, the City gave no preference to local firms; furthermore, the franchise agreement does not direct the C&D to a local processing or disposal facility. Nevertheless, the district court held that the ordinance and agreement creating the exclusive franchise discriminate against interstate commerce, and hence are virtually *per se* invalid under the Commerce Clause. The court based its ruling on its beliefs that (i) a municipality's exclusive franchise arrangement must entirely displace the private market to be non-discriminatory and (ii) a municipality does not entirely displace the private market for waste collection unless it directly bills its residents and then remits payment to its franchisee. The district court's ruling is plainly wrong.

In its negative aspect, the Commerce Clause denies the States the power to isolate themselves from the national economy. Accordingly, the Supreme Court has construed the Commerce Clause to prohibit state or municipal regulations that impede the flow of goods or services across state borders, or that favor in-state economic interests at the expense of out-of-state economic interests. In keeping with this purpose, the Supreme Court has established two separate tests for

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evaluating state or municipal regulations that affect commerce. If a regulation discriminates against interstate commerce, it is virtually *per se* invalid; but if it regulates even-handedly and imposes only incidental burdens on interstate commerce, it is evaluated under a much more permissive standard.

The district court erred in concluding that Delray Beach’s creation of an exclusive franchise arrangement for the collection of C&D discriminates against interstate commerce, and hence is subject to strict scrutiny. Out-of-state interests are not burdened, and in-state interests are not benefited, when a municipality selects an exclusive waste hauler through a non-discriminatory process and does not require local processing of the waste. Here, the district court concluded unequivocally that Delray Beach did not discriminate in selecting its waste hauler, and that the City does not control where the franchisee brings the waste. Those findings compel the conclusion that the Agreement and Ordinance do not discriminate against interstate commerce.

The district court’s belief that the exclusive franchise arrangement nonetheless is discriminatory because it requires “forced business transactions” between waste generators and the chosen hauler mistakes the Commerce Clause for an all-purpose economic regulatory regime. Not surprisingly, such an expansion of the Commerce Clause is unsupported by the case law. Other courts

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considering challenges to similar waste hauling franchises have uniformly concluded that they are not discriminatory and do not violate the Commerce Clause. In fact, if this Court were to affirm the district court’s decision, it would come into square conflict with decisions of the First and Eighth Circuits (and California Court of Appeal) upholding franchise arrangements just like the Delray Beach C&D franchise.

ARGUMENT

A. The Dormant Commerce Clause Prohibits Discriminatory Regulation.

1. The purpose of the Commerce Clause is to prevent economic Balkanization.

The Commerce Clause provides that Congress “shall have the power * * * [t]o regulate Commerce with foreign Nations, and among the several states.” U.S. Const. art. 1, § 8, cl. 3. Although framed as an affirmative grant of power to Congress to regulate interstate commerce, the Commerce Clause also “has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Oregon Waste Sys., Inc. v. Department of Env’tl. Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349 (1994). This “‘negative’ or ‘dormant’ aspect of the Commerce Clause prohibits States from ‘advanc[ing] their own commercial

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interests by curtailing the movement of articles of commerce, either into or out of the state.” *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources*, 504 U.S. 353, 359 112 S. Ct. 2019, 2023 (1992) (quoting *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535, 69 S. Ct. 657, 663 (1949)). The Clause reflects the Framers’ view “that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.” *Id.* at 98 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-326, 99 S. Ct. 1727, 1731 (1979)). Thus, “one state in its dealings with another may not place itself in a position of economic isolation” without violating the Commerce Clause. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527, 55 S. Ct. 497, 502 (1935).

“[N]ot every exercise of state power with some impact on interstate commerce is invalid” under the Commerce Clause. *Edgar v. MITE Corp.*, 457 U.S. 624, 640, 102 S. Ct. 2629, 2639 (1982). The “evil” addressed by the dormant Commerce Clause is “the prospect that States will use customs duties, exclusionary trade regulations, and other exercises of governmental power * * * to favor their own citizens.” *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685, 119 S. Ct. 2219, 2230 (1999). Put another way,

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the Commerce Clause principally is concerned with state or municipal regulations that *discriminate* against interstate trade. “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.” *Carbone*, 511 U.S. at 390, 114 S. Ct. at 1682.

In furtherance of the Commerce Clause’s focus on discrimination, the Supreme Court has spelled out two separate tests for evaluating state or municipal regulations that affect interstate commerce. If a state or municipal regulation discriminates against interstate commerce, it is “*per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.” *Carbone*, 511 U.S. at 392, 114 S. Ct. at 1683. In contrast, where “there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 2535 (1978). If the challenged law “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is

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clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142, 90 S. Ct. at 847.

2. Discriminatory regulations are those that impede the flow of commerce across state borders.

In most cases, the outcome of a Commerce Clause challenge to state regulation will turn on whether or not the regulation discriminates against interstate commerce. Discriminatory regulations are attempts by states or municipalities “to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.” *H.P. Hood & Sons*, 336 U.S. at 535, 69 S. Ct. at 663. Thus, “no State can, consistently with the Federal Constitution, impose upon the products of other States * * * more onerous public burdens or taxes than it imposes upon the like products of its own territory.” *Guy v. Baltimore*, 100 U.S. (10 Otto) 434, 439 (1879). The Commerce Clause also prohibits measures that “hoard a local resource * * * for the benefit of local businesses that treat it.” *Carbone*, 511 U.S. at 392, 114 S. Ct. at 1683. Put generally, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste*, 511 U.S. at 99, 114 S. Ct. at 1350.

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On many occasions, the Supreme Court has invalidated state or municipal regulations requiring goods to be processed by local operators, finding that they discriminate against interstate commerce. *See, e.g., South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237 (1984) (striking down state regulation requiring in-state processing of timber); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S. Ct. 295 (1951) (striking down ordinance requiring all milk sold in the city to be pasteurized within five miles of its center); *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156 (1948) (striking down South Carolina statute requiring shrimp fishermen to unload, pack, and stamp their catch before shipping it to another state); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S. Ct. 1 (1928) (striking down Louisiana statute requiring the pre-shipment processing of oysters). Such “local processing” requirements violate the Commerce Clause because they “erect[] an economic barrier protecting * * * local industry against competition from without the State.” *Dean Milk*, 340 U.S. at 354, 71 S. Ct. at 298,

The Supreme Court’s decision in *Carbone*, upon which the district court heavily relied, falls within the “local processing” line of cases. *Carbone* involved a flow-control ordinance that “require[d] all solid waste to be processed at a designated transfer station before leaving the municipality.” 511 U.S. at 386, 114 S. Ct. at 1680. The Court viewed this requirement as “just one more instance of

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local processing requirements that we have long held invalid.” 511 U.S. at 391, 114 S. Ct. at 1682. According to the Court, the “essential vice in laws of this sort is that they bar the import of the processing service.” 511 U.S. at 392, 114 S. Ct. at 1683. The flow-control ordinance in *Carbone* was invalid, the Court said, because it “hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.” *Id.*

B. The Delray Beach C&D Franchise Does Not Discriminate Against Interstate Commerce.

The district court invalidated the Delray Beach C&D franchise agreement and the related ordinance on the ground that they discriminate against interstate commerce. But neither the plaintiff nor the court identified *any* way in which the Agreement and Ordinance “benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. v. Limbach*, 486 U.S. 269, 273-274, 108 S. Ct. 1803, 1807 (1988). In fact, the undisputed facts demonstrated that the franchise agreement has no discriminatory features.

First, the Agreement and Ordinance do not curtail “the movement of articles of commerce” (*H.P. Hood & Sons*, 336 U.S. at 535, 69 S. Ct. at 663) across state borders. Unlike the flow control provision invalidated in *Carbone*, the franchise arrangement and the supporting ordinance impose no obligation to take C&D

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waste to a local facility for processing or disposal. Instead, Waste Management is free to take the waste to any facility, whether in-state or out-of-state. That fact was not disputed by the plaintiff, which affirmatively contended that “[t]he City is not concerned with where the City’s contractor brings the C&D for disposal,” and, in fact, does not even “know where its contractor brings C&D for disposal.” Doc 123 - Pg 7. Because the C&D franchise does not “hoard” the waste-processing service for the benefit of the local economy, *Carbone* and similar “local processing” cases are inapplicable.

Second, the Agreement and Ordinance do not in any other way “protect[] * * * local industry against competition from without the State.” *Dean Milk*, 340 U.S. at 354, 71 S. Ct. at 298. Waste haulers based in other states were free to compete for the C&D hauling contract, and, in that way, were given access to the local market. As the district court concluded, there was no dispute that the C&D hauler was selected in an open bidding process that did not discriminate against out-of-state firms.¹ *See* Doc 123 - Pg 10 (“Plaintiff has neither alleged nor shown

¹ Plaintiff contended that the City awarded BFI the exclusive C&D franchise without conducting any public bidding process (Doc 100 - ¶ 3), but the district court found the evidence unrefuted that C&D was included in the RFP that resulted in the award of the contract to BFI. Doc 123 - Pg 3 (“While Plaintiff contends that the bid specifications did not include the collection of C&D, it is clear that the

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that Defendants prohibited any non-local entities from bidding.”). Indeed, the franchise was awarded initially to BFI, a national waste company that according to plaintiff’s complaint is “a foreign corporation” (Doc 28 - ¶ 3), and was later assigned to Waste Management, another national company.

Thus, nothing about the exclusive franchise arrangement could “excite [the] jealousies and retaliatory measures the Constitution was designed to prevent.” *Carbone*, 511 U.S. at 390, 114 S. Ct. at 1682. Even if every municipality were to grant a single operator a five-year exclusive franchise for the collection of C&D within its boundaries, moreover, that would not isolate each state from competition and investment from outside. To the contrary, the widespread employment of such franchises would only increase interstate competition among firms to secure the exclusive hauling contracts. Accordingly, the Delray Beach C&D franchise is not discriminatory, and is not subject to strict scrutiny under the Commerce Clause.

C. The District Court’s Rationale For Finding Discrimination Was Flawed

The district court held that the Agreement and Ordinance discriminate against interstate commerce – and hence are virtually *per se* invalid – on the

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specifications stated that roll-off collection services would be exclusive to the contractor and that the contract defined roll-off collection to include C&D.”).

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ground that the City “is favoring one local hauler over all others” without having “eliminat[ed] the market entirely.” Doc 123 - Pg 13. Under this ruling, a municipal government cannot, consistent with the Commerce Clause, grant a private contractor an exclusive waste collection franchise unless the municipality performs the administrative task of billing consumers of waste collection services (or funds the collection of waste through tax dollars) and then pays the franchisee out of public funds. That decision is unprecedented. Indeed, in a recent decision, another Florida district court stated that it had not found, “upon exhaustive independent research, a single case that supports the notion that a city’s attempt to regulate the *collection* of waste is violative of the commerce clause.” *East Coast Recycling, Inc. v. City of Port St. Lucie*, 234 F. Supp. 2d 1259, 1264 (S. D. Fla. 2002) (emphasis added). The district court’s reasoning does not support its ground-breaking conclusion.

As an initial matter, the district court’s factual premise – that the City was “favoring one *local* hauler over all others” (Doc 123 - Pg 13 (emphasis added)) – is inherently flawed. As the court itself elsewhere recognized, there was no *local* favoritism involved in Delray Beach’s selection of BFI, and then WM, as the exclusive franchisee. *See id.* at 10 (“Plaintiff has neither alleged nor shown that Defendants prohibited any non-local entities from bidding.”). Moreover, neither

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BFI nor WM was required to make *local* investments, hire *local* workers, or bring the C&D waste to *local* facilities. In short, by deciding to grant exclusive rights to *one* hauler, the City was neither favoring local interests nor burdening out-of-state interests. It was simply requiring (for a limited period) that the inherently local service of waste collection be performed by only one company. Even if doing so had some *incidental* effect on interstate commerce (and it is hard to see how it could), it did not constitute *discrimination* against interstate commerce.

The legal premises of the district court’s ruling were equally unsound. In ruling that such an exclusive waste collection franchise violates the Commerce Clause, the district court relied principally on *Carbone* and *USA Recycling*.² But neither case supports the district court’s belief that an exclusive waste collection franchise discriminates against interstate commerce if the City allows its chosen contractor to bill consumers directly for waste collection.

Carbone involved a flow-control ordinance enacted by the City of Clarkstown, New York, that “require[d] all solid waste to be processed at a designated transfer station before leaving the municipality.” 511 U.S. at 386, 114

² More precisely, the court found the present case to be distinguishable from *USA Recycling*, and accordingly held implicitly that the franchise was unconstitutional under *Carbone*.

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S. Ct. at 1680. Clarkstown sought and obtained an injunction against the petitioner, which operated a recycling facility in the town, when it discovered that the petitioner was sending the waste from which the recyclables had been removed (“residual waste”) to disposal sites in Illinois, Indiana, West Virginia, and Florida rather than to the designated transfer station. 511 U.S. at 388, 114 S. Ct. at 1681. After the New York appellate courts upheld the injunction, the U.S. Supreme Court reversed. The Court viewed Clarkstown’s ordinance as “just one more instance of local processing requirements that we long have held invalid” (511 U.S. at 391, 114 S. Ct. at 1682) because they prevent out-of-state operators from competing to provide the processing service. Because residual waste from the out-of-state generators that used the petitioner’s recycling facility had to be sent to the designated transfer facility, the Court also noted that “the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste.” 511 U.S. at 389, 114 S. Ct. at 1681.

There is a vast difference between the flow-control ordinance at issue in *Carbone* and the waste collection franchise involved here. In *Carbone*, the ordinance prevented waste from leaving the state so that the local processing facility, and no out-of-state facility, would receive the tipping fees. The Court found that this violated the Commerce Clause because “[s]tate and local

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governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities.” 511 U.S. at 394, 114 S. Ct. at 1684. Here, the waste collection franchise was *open* to out-of-state competitors; there is no mandatory in-state processing; and the waste accordingly is free to travel to any out-of-state facility. Further, the exclusive franchise does not impose costs on any out-of-state generator. Hence, the concerns that led the Supreme Court to strike down Clarkstown’s ordinance are absent in Delray Beach.

The district court was equally mistaken in believing that *USA Recycling* dictates the conclusion that Delray Beach’s franchise agreement and implementing ordinance discriminate against interstate commerce. In *USA Recycling*, the Second Circuit *upheld* a city ordinance giving one hauler the exclusive right to collect waste on the ground that the town “provided the garbage service by using public funds” and hence “had eliminated the market entirely.” Doc 123 - Pg 12. The court below placed heavy weight on the Second Circuit’s statement that, by paying for waste service using tax funds, Babylon avoided the “forced business transaction[s]” that “rendered” the ordinances in *Carbone* and *SSC Corp. v. Town*

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of Smithtown, 66 F.3d 502 (2d Cir. 1995), “discriminatory against interstate commerce.” Doc 123 - Pg 12 (quoting *USA Recycling*, 66 F.3d at 1283).³

To be sure, the Second Circuit did hold that there could be no discrimination when Babylon was “unilaterally provid[ing] garbage service to everyone in the District.” 66 F.3d at 1283. But the court in no way indicated that the converse – *i.e.*, that there perforce is discrimination unless the municipality has completely taken over waste collection and pays for it through public funds – is also true. To the contrary, the court’s further analysis of the exclusive license shows that, even setting aside the fact that Babylon had taken over the market for waste collection, the Second Circuit discerned no discrimination against out-of-state economic interests at all:

[W]hile the takeover will result in only one garbage hauler collecting commercial garbage on the Town’s behalf in Babylon, the new system

³ In *SSC*, Smithtown had adopted an ordinance – similar to the ordinance at issue in *Carbone* – requiring that all waste in town be taken for disposal to a privately owned incinerator. 66 F.3d at 507. The fact that Smithtown “threatened garbage haulers with criminal fines if they fail to do business with Smithtown at the Huntington incinerator” (*id.* at 512) was relevant to the Second Circuit’s Commerce Clause analysis, not because “forced business transactions” inherently discriminate against interstate commerce, but because they demonstrated that Smithtown’s flow control ordinance could not be upheld under the market participant doctrine. As the Second Circuit stated, because “[n]o private company in the open market could force others to buy its services under pain of criminal penalties,” Smithtown was acting as a regulator, not a market participant. *Id.*

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will not necessarily increase or decrease interstate commerce in garbage collection. Any impact on interstate commerce would depend on whether a single buyer (the Town), purchasing collection services in bulk for the entire District, would tend to hire out-of-state garbage haulers more often or less often than numerous buyers (Babylon’s individual businesses) would have under the old system. * * * There is no reason to assume that by shifting all hiring of garbage haulers into the hands of one buyer, the flow of interstate commerce will be reduced, and thereby burdened. In fact, the open bidding process used by the Town to hire a single garbage hauler could readily result in the hiring of an out-of-state garbage hauler – which would actually shift a portion of the garbage collection market <i>into</i> interstate commerce.	
66 F.3d at 1287.	
The same reasoning applies here. Even assuming that Delray Beach has not eliminated the local garbage market, its decision to funnel all C&D collection to a single (national) firm for five years did not disadvantage out-of-state companies or commerce at all. And the undisputed fact that C&D need not be processed or disposed of at a local facility means that the arrangement does not diminish the flow of waste itself across state borders or harm out-of-state disposal facilities. Because the franchise thus involves no “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter” (<i>Oregon Waste Sys.</i> , 511 U.S. at 99, 114 S. Ct. at 1350), there is no basis for applying strict scrutiny.	

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The district court plainly finds the exclusive franchise arrangement and its attendant 5% franchise fee to be distasteful. Indeed, in its order denying defendants’ motion to dismiss, it characterized the arrangement as a “kickback.” Doc 67 – Pg 6 (“It remains to be shown what exactly the City does to earn its five percent cut of the fees collected. In fact, the Defendants do not attempt to explain or even mention this apparent kickback in either the Response or the Reply.”). But the sole concern of the Commerce Clause is *interstate* commerce, not whether it is appropriate for a municipality to award an exclusive franchise and then charge a percentage-based franchise fee. The district court’s effort to use the Commerce Clause to vindicate that perceived impropriety (with which, in fact, there is not a thing wrong), calls to mind the old saying that “when all you’ve got is a hammer, everything starts looking like a nail.” The Commerce Clause is not the all-purpose hammer that the district court believed it to be, however, and reversal of the court’s summary judgment is therefore required.

D. Other Courts Have Concluded That Exclusive Waste Collection Franchises Identical To Delray Beach’s C&D Franchise Do Not Discriminate Against Interstate Commerce

In holding that the Delray Beach C&D franchise agreement and ordinance do not violate the Commerce Clause, this Court would not be breaking new ground. Other federal and state appellate courts have concluded that waste

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collection franchises that are identical to the Delray Beach franchise neither discriminate against interstate commerce, nor impose significant incidental burdens on interstate commerce. In fact, if this Court were to affirm the district court’s holding that the C&D franchise is discriminatory, it would come into square conflict with decisions of the First and Eighth Circuits, as well as the California Court of Appeal.

In *Houlton Citizens’ Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), the First Circuit upheld an ordinance that designated a single firm as the exclusive hauler of residential waste within the town’s borders, but did not require the hauler to bring the waste to any particular facility. The court began its analysis by stating that, unlike *USA Recycling*, the Houlton ordinance “explicitly create[d] forced business transactions” by requiring “that those municipal residents * * * contract individually with the Town’s designated hauler.” *Id.* at 188. The First Circuit nevertheless concluded that the ordinance was not discriminatory against interstate commerce, explaining:

[W]hen the Commerce Clause inquiry focuses on a state or local plan that culminates in an award of an exclusive contract to one of several aspirants (actual or potential), the process by which the contractor is chosen assumes great importance in determining the plan’s constitutionality *vel non*. After all, in-state interests are not unduly pampered, nor out-of-state competitors unduly burdened, when a municipality awards an exclusive contract to a low bidder (from

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whatever state or region) after a fair and open bidding process. In such circumstances, unrestricted access to the bidding process constitutes unrestricted access to the relevant market.	
<i>Id.</i> at 188-189 (citation omitted). ⁴	

The First Circuit noted that the record “contain[ed] no hint that the Town restricted the bid protocol to a particular class of bidders, shaped it to favor in-state operators, or slanted it in any way against out-of-state purveyors.” *Id.* It also observed that the RFP did not “lock bidders into using a particular transfer station,” but instead allowed the successful bidder “to contract with whomever the bidder chooses (in-state or out-of-state) to process the garbage and effectuate disposal at any lawful site within or without the state.” *Id.* Based on these facts, it concluded that Houlton’s exclusive waste collection franchise did not discriminate against interstate commerce. The court proceeded to conclude that, “[i]n light of the strong local interest in efficient and effective waste management and the

⁴ The First Circuit is not alone in its view that, for purposes of establishing the absence of discrimination under the Commerce Clause, an open bidding process constitutes adequate access to the local market. The Third Circuit has held that, even when an in-state *facility* is chosen as the exclusive destination for waste, the Commerce Clause inquiry should focus “on the designation process, on the reasonableness of the duration of the designation and on the practical likelihood of [designation of] an out-of-state facility.” *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 807 (3d Cir. 1995).

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virtually invisible burden that the Town’s scheme places on interstate commerce, Houlton passes [the *Pike* balancing] test with flying colors.” *Id.* at 189.

The present case is indistinguishable from *Houlton*. As the district court explicitly found, there is no evidence that the City of Delray Beach favored in-state firms when it awarded the C&D franchise. Doc 123 - Pg 10. Furthermore, it is undisputed that the City allowed the franchisee to choose any facility (in-state or out-of-state) for the processing and disposal of C&D. *Id.* at 7. The court below refused to follow *Houlton*, not because it found the case to be distinguishable, but because it believed that the First Circuit had “all but completely disregarded [the fact] that Houlton * * * did not expend public funds in support of its contractual arrangement.” *Id.* at 10. That is not so: the First Circuit expressly took that fact into account, but upheld the ordinance because it did not favor in-state interests at the expense of out-of-state interests. 175 F.3d at 188-189.

In an unpublished decision, the Eighth Circuit, too, held very recently that an exclusive waste collection franchise similar to the Delray Beach C&D franchise does not violate the Commerce Clause. *See Barker Sanitation v. City of Nebraska City*, 2004 WL 1418753 (8th Cir. June 25, 2004). The court of appeals adopted the reasoning of the district court, which analyzed the provision in detail and found that it did not discriminate against interstate commerce on its face, in effect, or in

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its purpose, and that the numerous local benefits achieved were not outweighed by the incidental burdens on interstate commerce. *See Barker Sanitation v. City of Nebraska City*, No. 4:02CV3330, slip op. at 14-22 (D. Neb. Nov. 4, 2003).⁵ In ruling that the exclusive franchise agreement and ordinance were not discriminatory, the court noted that the franchisee was not subject to local processing requirements. *Id.* at 15. It also pointed out that there was no evidence that the franchise “actually deprive[d] out-of-state waste processors and collection facilities access to the Nebraska market” or “benefit[ed] in-state waste haulers, processors, and collection facilities at the expense of similar out-of-state entities.” *Id.* at 16.

A California appellate court also has upheld a similar franchise. In *Waste Management of Alameda County, Inc. v. Biagini Waste Reduction Sys.*, 74 Cal. Rptr. 2d 676, 63 Cal. App. 4th 1488 (Cal. Ct. App. 1998), the court considered an ordinance that gave Waste Management the sole right to collect certain categories of solid waste within the City of Oakland. As in Delray Beach, the franchisee collected fees from customers for its services and transmitted a franchise fee to the City.

⁵ Copies of the Eighth Circuit’s unpublished decision and the district court’s slip opinion are appended to this brief for the Court’s convenience.

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Relying on several factors that apply fully to Delray Beach, the court ruled that the Oakland ordinance does not discriminate against interstate commerce. First, the court said, the ordinance is “not a flow control ordinance of the nature condemned in *Carbone*” because “out-of-state garbage collectors are not forced by the ordinance to purchase solid waste processing services from the local exclusive franchise provider.” 74 Cal. Rptr. 2d at 682, 63 Cal. App. 4th at 1497. Second, it observed:

The ordinance * * * treats identically local and out-of-state garbage haulers. Both are effectively foreclosed from collecting or transporting garbage in the city if not designated as the “collector,” and both may compete to obtain the exclusive franchise presently awarded to respondent. Local processors and facilities are neither treated with more preference nor disadvantaged with respect to out-of-state competitors. The latter are not deprived of access to a local market.

Id. (citations omitted). Finally, it noted that the ordinance “does not prohibit the flow of interstate goods or services, place added costs on them, or distinguish between in-state and out-of-state companies in the retail market.” 74 Cal. Rptr. 2d at 683, 63 Cal. App. 4th at 1498. Thus, the ordinance did not “have as its objective ‘local economic protectionism ... that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.’” *Id.* (quoting *Carbone*, 511 U.S. at 390, 114 S. Ct. at 1682).

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This reasoning applies fully to the Delray Beach C&D franchise. Like the franchise arrangements in Houlton, Nebraska City and Oakland, it plainly does not discriminate against interstate commerce. Accordingly, the district court erred in subjecting the Agreement and Ordinance to strict scrutiny.

CONCLUSION

Because the district court erred in applying strict scrutiny to the Agreement and Ordinance, the judgment below should be reversed and the case should be remanded for application of the *Pike* balancing test.

Respectfully submitted.

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