No. 05-2024-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED HAULERS ASS'N, INC., ET AL.,
PLAINTIFFS-APPELLANTS,
V.
ONEIDA-HERKIMER SOLID WASTE
MANAGEMENT AUTHORITY, ET AL.
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the Northern District of New York

BRIEF OF PLAINTIFFS-APPELLANTS

EVAN M. TAGER
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Plaintiffs-Appellants

July 2005

CORPORATE DISCLOSURE STATEMENT

As required by FRAP Rule 26.1, below is the corporate disclosure statement for each Appellant in the captioned action:

1. Appellant United Haulers Association, Inc. has no parent corporation. There are no publicly-held companies that own 10% or more of this Appellant's stock.

2. Appellant Transfer Systems, Inc. has no parent corporation. There are no publicly-held companies that own 10% or more of this Appellant's stock.

3. Appellant Bliss Enterprises, Inc. has no parent corporation. There are no publicly-held companies that own 10% or more of this Appellant's stock.

4. Appellant Ken Wittman Sanitation has no parent corporation. There are no publicly-held companies that own 10% or more of this Appellant's stock.

5. Appellant Bristol Trash Removal has no parent corporation. There are no publicly-held companies that own 10% or more of this Appellant's stock.

6. Appellant Levitt's Commercial Containers, Inc. has no parent corporation. There are no publicly-held companies that own 10% or more of this Appellant's stock.

7. Appellant Ingersoll Pickup, Inc. has no parent corporation. There are no publicly-held companies that own 10% or more of this Appellant's stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. THE DISTRICT COURT MISCONSTRUED THE *PIKE* TEST 14

A. *Pike* Does Not Require A Showing Of Disparate Impact On In-State And Out-of-State Commercial Interests 14

B. This Court's Prior Rulings Do Not Support The District Court's Restrictive Interpretation Of The *Pike* Test 21

II. THE COUNTIES' FLOW CONTROL ORDINANCES ARE UNCONSTITUTIONAL UNDER *PIKE* 25

A. The Flow Control Provisions Heavily Burden Interstate Commerce 25

B. The Burdens On Interstate Commerce Imposed By The Flow Control Provisions Are Excessive In Comparison To The Putative Local Benefits 31

CONCLUSION 35

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Page(s)

Cases

A.C.L.U. v. Johnson, 194 F.3d 1149 (10th Cir. 1999) 21

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987) 16

Bibb v. Navaho Freight Lines, Inc., 359 U.S. 520 (1959)....................18

Blue Circle Cement, Inc. v. Board of County Comm'rs, 27 F.3d 1499
(10th Cir. 1994) 21

Brimmer v. Rebman, 138 U.S. 78 (1891) 18

Brown-Forman Distillers Corp. v. New York State Liquor Auth.,
476 U.S. 573 (1986)....................16

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) ....*passim*

Chambers Med. Techs of S.C., Inc. v. Bryant, 52 F.3d 1252
(4th Cir. 1995) 20

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)....................14, 15

Dorrance v. McCarthy, 957 F.2d 761 (10th Cir. 1992) 21

Edgar v. MITE Corp., 457 U.S. 624 (1982) 16

Faulkner v. National Geographic Enters., Inc., 409 F.3d 26
(2d Cir. 2005) 14

Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205 (2d Cir. 2004) 10, 21, 25

Granholm v. Heald, 125 S. Ct. 1885 (2005)....................27

Healy v. Beer Inst., 491 U.S. 324 (1989)....................30

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977) 16

McNeilus Truck & Mfg., Inc. v. Ohio, 226 F.3d 429 (6th Cir. 2000) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Minnesota v. Barber, 136 U.S. 313 (1890)....................30

National Electric Manufacturers Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001)....................21, 23, 25

Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994)....................15

PSINet, Inc. v. Chapman, 362 F.3d 227 (4th Cir. 2004)....................20

Pacific Northwest Venison Producers v. Smith, 20 F.3d 1008 (9th Cir. 1994)....................24, 25

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)....................*passim*

R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731 (8th Cir. 2002)....................20

Randy's Sanitation v. Wright County, Minn., 65 F. Supp. 1017 (D. Minn. 1999)....................31

Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978)....................18

SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995)....................8, 14, 15

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984)....................8

Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945)....................18

U & I Sanitation v. City of Columbus, 205 F.3d 1063 (8th Cir. 2000)....................19, 20, 30, 34

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245 (2001)....................*passim*

Statutes

42 U.S.C. § 1983....................7

28 U.S.C. § 1291....................1

28 U.S.C. § 1331....................1

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 636(b)(1)(B) 8

Fed.R.App.P. 32(a)(7)...38

N.Y. Pub. Auth. Law § 2049-ee(4) 4

Miscellaneous

Herkimer County Local Law No. 1 5

Oneida County Local Law No. 1..4, 5

This is an appeal from a decision of United States District Court Judge Norman A. Mordue. The decision of the district court is unreported.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. The district court entered final judgment in favor of defendants on March 24, 2005. A-886. Plaintiffs filed a timely notice of appeal on April 22, 2005. A-887. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Plaintiffs in this action challenge "flow control" legislation that requires all waste generated within Oneida and Herkimer Counties to be delivered to designated publicly-owned facilities. The district court initially struck down the flow control laws under the dormant Commerce Clause after concluding that they discriminate against interstate commerce. In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245 (2001) ("*United Haulers I*"), this Court ruled that the flow control provisions are not subject to the rule of virtually *per se* invalidity applicable to discriminatory legislation, but instead must be analyzed under the balancing test established by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). On remand, the district court concluded that the flow control provisions pass muster under the *Pike* test because they have no disparate impact

on in-state and out-of-state private businesses. This appeal presents the following issues:

1. Whether the district court erred in concluding that it is unnecessary to conduct any balancing of benefits and burdens under the *Pike* test unless it is first established that the regulation at issue has a disparate impact on in-state and out-of-state businesses.

2. Whether the flow control provisions should be invalidated under the Commerce Clause because they impose burdens on interstate commerce that are excessive in relation to their putative local benefits.

STATEMENT OF THE CASE

Plaintiffs filed this action in 1995 against Oneida-Herkimer Solid Waste Management Authority (the "Authority"), the County of Oneida, and the County of Herkimer in the federal district court for the Northern District of New York, contending that the Counties' flow control provisions violate the dormant Commerce Clause. The district court granted summary judgment to plaintiffs, declaring that the flow control laws were unconstitutional, enjoining the Counties and the Authority from enforcing them, and referring the action to a magistrate judge for the calculation of damages. A-812-826.

Defendants appealed, and this Court reversed. *See United Haulers I*, 261 F.3d 245. The Court held that the district court erred in evaluating the flow control

provisions under the standards applicable to discriminatory legislation, and instead should have applied the more lenient balancing test articulated in *Pike,* 397 U.S. at 142. *United Haulers I*, 261 F.3d at 257. The Court remanded the case and directed the district court to "analyze[] the Counties' flow control laws under the *Pike* test to determine whether the laws' effects on interstate commerce substantially outweigh the local benefits." *Id.*

On remand, and after substantial discovery, both plaintiffs and defendants moved for summary judgment. The district court referred the parties' cross-motions for summary judgment to the United States Magistrate Judge. The Magistrate Judge recommended that plaintiffs' motion for summary judgment be denied, and that defendants' motion for summary judgment be granted, after concluding that the flow control provisions impose no burdens on interstate commerce "that are qualitatively or quantitatively different from those experienced in relation to intrastate commerce." SPA-3-4.

Plaintiffs filed timely objections to the Report and Recommendation of the Magistrate Judge. The district court issued a written opinion rejecting plaintiffs' objections, ordered that the Report and Recommendation be adopted in its entirety, granted defendants' motion for summary judgment, and dismissed the complaint. SPA-59. Plaintiffs filed a timely notice of appeal. A-887.

STATEMENT OF FACTS

1. *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"). *See* N.Y. Pub. Auth. Law § 2049-ee(4). In May and December 1989, the Authority entered into contracts with the Counties that required it to purchase, operate, construct, and develop facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties. *See* Dkt. No. 147, Exs. 19 and 20.[1] For their part, the Counties agreed to ensure the delivery of all solid waste generated within their borders to facilities designated by the Authority. *See id.*

In December 1989, Oneida County passed the required flow control ordinance. *See* Oneida County Local Law No. 1 of 1990 (A-174-181). 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 . . . ." *Id.* § 2 (d) (A-176). Under the ordinance, any hauler handling waste generated in the County must have a valid permit issued by the County or the Authority (*id.* § 10(a) (A-179)) and must deliver all construction debris, green waste, commercial and industrial waste, curbside

---

[1] Copies of these agreements are reproduced in the Joint Appendix submitted in connection with the prior appeal ("*United Haulers I* App."), at pages 220 to 274.

recyclables, major appliances and tires, household hazardous waste, and infectious waste to designated facilities (*id.* §§ 2-9 (A-176-179)). Penalties for noncompliance include permit revocation, fines, and imprisonment. *Id.* § 12(a)-(c) (A-180-181). Herkimer County enacted an almost identical flow control ordinance in February 1990. *See* Herkimer County Local Law No. 1 of 1990 (A-182-195).

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. *See* Dkt. No. 15, Ex. E, at 122 (*United Haulers I* App. 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, after issuing a request for proposals and considering the responses it received, 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. *See* Dkt. No. 15, Ex. I (*United Haulers I* App. 275-320). 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. *Id.* at 16-17 (*United Haulers I* App. 290-291).

The agreement with Empire expired in 1998, at which time Waste Management of New York, L.L.C., was selected to operate the transfer station. *See* Dkt. No. 148, Ex. 30. Under that contract, waste handled by the Authority's transfer stations is transported to the High Acres Landfill in Fairport, New York. *See id.* at 2.

At the time this action commenced in 1995, the Authority had designated five Authority-owned facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties — an incinerator, a recycling center, an ash landfill, a green waste compost facility, and the Utica Transfer Station. *See* A-321-322. 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.

As the Magistrate Judge explained, "[t]he net effect of these flow control provisions . . . is that trash haulers and generators are required to deliver solid waste to those designated central collection points, and to make a per ton payment — often referred to as a 'tipping fee' — for all solid waste delivered." SPA-6. The flow control provisions direct more than 200,000 tons of solid waste per year to the County-designated facilities (A-202), generating revenues of more than $16 million for the Authority annually. *See* Dkt. No. 148, Ex. 29, at 3.

As this Court recognized in *United Haulers I*, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." 261 F.3d at 751. Plaintiffs presented evidence that the tipping fees charged to private haulers at the Authority's transfer stations are 68% higher than the average New York State tipping fee. *See* A-211, A-284. The Authority's fees also are substantially higher than the fees charged at competing out-of-state facilities. A-284-288. Several plaintiffs identified out-of-state landfills at which they could dispose of waste more cheaply than at the Authority's designated facilities. *See, e.g.,* A-285-286, A-301-303, A-326-327, A-658-659. The flow control provisions prohibited these haulers from participating in the highly competitive interstate waste processing and disposal market. *See* A-203.

3. *Proceedings below.* In April 1995, plaintiffs sued the Authority and both Counties, alleging, *inter alia,* 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. *See* A-37. On March 31, 2000, the district court (Pooler, J., sitting by designation) granted plaintiffs' motion for summary judgment, concluding that the flow control laws, which it found were "virtually indistinguishable from the laws examined and struck down

in [*C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994)] and [*SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 509 (2d Cir. 1995)]," discriminated against interstate commerce in violation of the dormant Commerce Clause. A-820.

On appeal, the Court reasoned 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." *United Haulers I*, 261 F.3d at 257.[2] Accordingly, it held that the district court had erred in applying to the flow controls laws the "virtually *per se* rule of invalidity" applicable to discriminatory legislation. *Id.* at 260 (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984)). Instead, it ruled that "the district court should have analyzed the Counties' flow control laws under the [balancing test set forth in *Pike*] to determine whether the laws' effects on interstate commerce substantially outweigh the local benefits." *Id.* at 257. The Court accordingly "reverse[d] and remand[ed] for a determination of whether the Counties' flow control laws pass constitutional muster under the *Pike* balancing test." *Id.* at 264.

Following the remand, after discovery regarding the issue of liability, both parties moved for summary judgment. Dkt. Nos. 145, 152, 160. Pursuant to 28 U.S.C. § 636(b)(1)(B), the district court referred the cross-motions for summary

---

[2] For purposes of the current appeal, we treat the Court's ruling that the flow control provisions are not discriminatory as the law of the case. However, we continue to maintain that the ruling is inconsistent with *Carbone,* and we expressly reserve our right to seek further review of that decision at the appropriate time.

judgment to Magistrate Judge David Peebles for issuance of a report and recommendation. Dkt. No. 180.

After considering the parties' written submissions and hearing oral argument, the Magistrate Judge recommended granting summary judgment in favor of defendants. SPA-38. The Magistrate Judge recognized that *Pike* "requires the court to examine and uphold the challenged provisions unless 'the ***burden*** on [interstate] commerce is clearly excessive in relation to the putative local ***benefits***.'" SPA-16 (quoting *Pike*, 397 U.S. at 142) (emphasis added). Nevertheless, he decided that there was no need for "the 'fact-intensive' balancing" of benefits and burdens "contemplated by [this Court] in its remand of this case" (SPA-21) because it had not first been shown that the flow control provisions "impose burdens on ***interstate*** commerce that exceed those placed on ***intrastate*** commerce" (SPA-37-38) (emphasis added).

According to the Magistrate Judge, "the lesson of the Second Circuit's earlier decision in this case, as well as *Pike* itself, is that regulatory provisions under scrutiny pass dormant Commerce Clause muster ***unless they treat out-of-state entities less favorably than similarly situated in-state concerns***." SPA-29 (emphasis added); *see also id.* ("The critical inquiry . . . is whether an out-of-state business is treated less favorably than one similarly situated but within the state."). According to the Magistrate Judge, the fact that "a local private trash business is

treated no differently" under the County's regulatory regime "than one situated out of state" was dispositive. SPA-30. Because there was "no evidence of a quantitative or qualitative difference in the burdens placed by the challenged ordinance on interstate and interstate commerce," the Magistrate Judge reasoned, there was no need to "proceed to the next step of balancing the burdens against the putative benefits associated with the legislation" SPA-35.

Over plaintiffs' objections, the district court adopted the Report and Recommendation in its entirety. SPA-59. According to the district court:

> [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. [*Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 218 (2d Cir. 2004).] ***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.

SPA-54-55 (emphasis in bold supplied by the court; emphasis in bold italics added).

The district court specifically rejected plaintiffs' argument that it was erroneous "for the Magistrate to restrict his inquiry to evidence of a disparate impact of the regulations on in-state and out-of-state private business." SPA-56. According to the district court, because the record showed "no distinction in the

treatment of in-state versus out-of-state businesses under the challenged flow control ordinances," there could be no violation of the Commerce Clause, and there was thus no reason to undertake any balancing of the legislation's benefits and burdens. SPA-52.

SUMMARY OF ARGUMENT

The flow control ordinances adopted by Oneida and Herkimer Counties mandate that all waste generated in the Counties be delivered to one of several designated in-state facilities. These provisions clearly curtail interstate commerce by prohibiting in-state generators and haulers from procuring waste handling and disposal services from out-of-state companies and facilities. The district court, however, ruled that the ordinances do not "burden" interstate commerce at all, and thus do not violate the Commerce Clause, because they do not have a "disparate impact" on in-state and out-of-state commercial interests. The lower court's decision rests on a fundamental misunderstanding of the *Pike* test and should be reversed.

In *United Haulers I*, this Court instructed the district court to evaluate the constitutionality of the Counties' flow control provisions under the balancing test described in *Pike*. Under *Pike*, even-handed state regulations are invalid under the Commerce Clause if they impose burdens on interstate commerce that are excessive in relation to the putative local benefits. In contrast, regulations that

discriminate against interstate commerce are deemed invalid unless their proponents can demonstrate, under rigorous scrutiny, that the government has no other means to advance a legitimate local interest.

The district court held that it was unnecessary to engage in the balancing of benefits and burdens envisioned by *Pike* because the flow control provisions have the same impact on in-state and out-of-state commercial interests. The Supreme Court, however, never has suggested that disparate treatment of in-state and out-of-state commercial actors is a prerequisite to *Pike* balancing. Indeed, to impose such a requirement would render the *Pike* test a nullity, because regulations that have a disparate impact on in-state and out-of-state companies are considered discriminatory and hence virtually *per se* invalid under the Commerce Clause.

To justify its restrictive construction of the *Pike* test, the district court relied on *United Haulers I* and several other decisions of this Court. In concluding that the flow control provisions do not ***discriminate*** against out-of-state ***firms***, however, this Court did not suggest that they do not ***burden*** interstate ***commerce***. To the contrary, the Court's decision to remand the case for application of the *Pike* test implies just the opposite. In its prior decisions, moreover, this Court has expressly recognized that many types of burdens on interstate commerce are sufficiently important to trigger *Pike* balancing.

The flow control provisions severely burden interstate commerce in waste handling and disposal services. First, they prohibit in-state generators and private haulers from patronizing out-of-state facilities. Second, they preclude outside investors from competing for a share of the Counties' waste through investment in local facilities. If every jurisdiction adopted similar measures, interstate traffic in waste would be even more severely limited.

Out-of-state firms periodically have been allowed to bid for the right to dispose of the non-recyclable portion of the Counties' waste stream after it has passed through a designated facility. But that is no substitute for the right to seek business directly from generators and haulers and to provide the initial processing and recycling services. Once the Authority completes its plan to construct a local landfill, moreover, out-of-state waste companies will lose even this limited form of access to the local market.

These severe burdens on interstate commerce greatly outweigh the putative benefits. The flow control provisions principally are a financing measure. By allowing the Authority to charge above-market rates without losing waste volume, they guarantee that the Authority's facilities will generate sufficient revenues to pay for its operations. There are many ways to finance waste management programs without flow control, however. For example, the Authority could charge competitive rates for its services and then finance any shortfall through taxes, user

fees, license fees, or other methods. Such an approach would allow the Authority to provide reliable waste disposal services for the community without restricting the interstate flow of waste-related services.

ARGUMENT

This Court reviews the district court's grant or denial of summary judgment *de novo*, viewing the evidence in the light most favorable to the non-moving party. *Faulkner v. National Geographic Enters., Inc.*, 409 F.3d 26, 34 (2d Cir. 2005). "Summary judgment is only appropriate if, based on the pleadings and evidentiary submissions, there is no genuine material issue of fact and the moving party is entitled to judgment as a matter of law." *Id.* Here, the undisputed facts demonstrate that plaintiffs, not defendants, are entitled to summary judgment.

I. THE DISTRICT COURT MISCONSTRUED THE *PIKE* TEST

A. *Pike* Does Not Require A Showing Of Disparate Impact On In-State And Out-of-State Commercial Interests

"To implement the goals of curbing local protectionism and facilitating a national market, the courts have derived from the Commerce Clause limitations on the states' abilities to legislate in the service of parochial interests." *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 509 (2d Cir. 1995). Under the Commerce Clause, "[s]tate regulations that discriminate against interstate commerce are subject to a 'virtually *per se* rule of invalidity.'" *Id.* (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). "'[D]iscrimination' simply means

differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). Discriminatory regulations will be struck down unless "the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

In contrast, where "there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church*." *City of Philadelphia*, 437 U.S. at 624. Under *Pike*, 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 clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. "When weighing burdens against benefits" under the *Pike* test, "a court should consider both 'the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities.'" *SSC Corp.*, 66 F.3d at 510 (quoting *Pike*, 397 U.S. at 142).

Here, the district court held that the balancing of benefits and burdens required under *Pike* was unnecessary because the record reflected "no distinction in the treatment of in-state versus out-of-state businesses under the challenged flow

control ordinances." SPA-52. The Supreme Court, however, never has indicated that a disparate impact on interstate commerce 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); *see also Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *MITE Corp.*, 457 U.S. at 643, 644-646. When a state law ***does*** have a differential impact on in-state and out-of-state commercial 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.*, *American 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").

Thus, if the district court's construction of the *Pike* test were correct, there would never be any need to undertake *Pike* balancing, because any regulation meriting such an analysis also would be subject to the more stringent standard applicable to discriminatory legislation. In fact, however, disparate treatment of

in-state and out-of-state commercial interests is ***not*** a threshold requirement under *Pike*.

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 commerce when considered in relation to the local benefits conferred." *Id.* 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 id.*[3]

---

[3] The majority opinion in *Carbone* implicitly supports Justice O'Connor's conclusion that a finding of non-discrimination in the treatment of in-state and out-of-state interests does not end the Commerce Clause inquiry. The majority concluded that Clarkstown's ordinance ***burdened*** interstate commerce ***before*** examining whether it ***discriminated*** against interstate commerce. 511 U.S. at 389-390 ("The real question is whether the flow control ordinance is valid despite ***its undoubted effect on interstate commerce.***") (emphasis added). Although the majority ultimately found it unnecessary to "resort to the *Pike* test" (*id.* at 390), it plainly viewed the closing of the local waste-processing market to outside interests

Justice O'Connor expressly rejected any notion that the flow control law's equal application to in-state and out-of-state businesses meant that it satisfied the Commerce Clause. As she stated, the Supreme 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.'" *Id.* at 405 (quoting *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891)).

Indeed, as Justice O'Connor indicated, the Supreme Court repeatedly has found state regulation to be invalid under the Commerce Clause even when it does not advance the interests of in-state commercial interests at the expense of out-of-state interests. *See, e.g.*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (state regulation limiting length of trucks operating on highways within state held unconstitutional under *Pike*); *Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520, 526-530 (1959) (unconstitutional for Illinois to require truck mudguards when that requirement conflicts with requirements of other states); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 773 (1945) (unconstitutional for Arizona to regulate train lengths in a manner that "materially impedes the movement of interstate trains through that state"). Many lower courts also have applied *Pike* to invalidate evenhanded state laws that impose burdens on interstate

---

as a substantial burden on interstate commerce that would have been subject to *Pike*'s balancing analysis had it not been invalidated under strict scrutiny.

commerce that exceed their benefits — even when those laws do ***not*** impose unequal burdens on out-of-state firms.

In *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000), for example, the Eighth Circuit addressed a municipal flow control ordinance that was otherwise very similar to the Counties' 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). Under the rule applied by the district court in this case, that would have been the end of the analysis and the ordinance would have been upheld. But the Eighth Circuit invalidated the challenged ordinance because "the local interests that it serves do not justify the burden that it imposes upon interstate commerce." *Id.*

Engaging in the balancing analysis mandated by *Pike*, 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);[4] *McNeilus Truck & Mfg., 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*

---

[4] *See also Chambers Med. Techs of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1261-1262 (4th Cir. 1995) (applying *Pike* test where challenged law "regulate[d] evenhandedly and ha[d] only incidental effects on interstate commerce").

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." *Id.*

B. This Court's Prior Rulings Do Not Support The District Court's Restrictive Interpretation Of The *Pike* Test

In ruling that *Pike* requires a showing of discrimination between in-state and out-of-state business interests, the district court relied heavily on *Freedom Holdings*, 357 F.3d at 217-228, and *National Electric Manufacturers Ass'n ("NEMA") v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001), as well as *United Haulers I*. To the extent that these decisions deem *Pike* balancing superfluous unless the challenged legislation has a disparate impact on in-state and out-of-state businesses, we respectfully contend that they conflict with the Supreme Court's

rulings and should be reconsidered. In fact, however, the district court viewed too narrowly the types of burdens on interstate commerce that are subject to *Pike* balancing under this Court's precedents.

In *United Haulers I*, this Court never suggested that legislation is subject to *Pike*'s balancing analysis only if the legislation has a disparate impact on out-of-state business interests. The Court stated that "a flow control ordinance governing the processing of waste is not ***discriminatory*** under the Commerce Clause unless it favors local private business over out-of-state interests." 261 F.3d at 263 (emphasis added). Applying that rule, the Court concluded that the Oneida-Herkimer ordinances "are not ***discriminatory*** under the dormant commerce clause" because they "negatively impact all private businesses alike, regardless of whether in-state or out-of-state." *Id.* (emphasis added).

The Court did not suggest, however, that its finding of non-discrimination meant that the flow control provisions did not impose burdens on interstate commerce that should be balanced against the legislation's putative benefits under *Pike*. To the contrary, it affirmatively acknowledged that non-discriminatory regulations can "place burdens on the free flow of commerce between the states." *Id.* at 264. The Court specifically indicated, moreover, that, "[t]o the extent that a state or local government risks causing inconsistent state laws or inciting

retaliation among the states to the detriment of the 'national market,' the *Pike* test is a suitable vehicle for judicial review." *Id.* at 262.

In deeming the *Pike* analysis unnecessary despite this Court's directive to apply it, the trial court cited this Court's statement in *NEMA* that state regulation cannot "run afoul of the *Pike* standard" unless it "impose[s] a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." 272 F.3d at 109. The Court made very clear in *NEMA*, however, that "***several types of burdens on interstate commerce would qualify as 'disparate' to trigger Pike balancing***." *Id.* at 109-110 (emphasis added). These were said to include "control of commerce that occurs wholly beyond the state's borders" and the "risk of imposing regulatory requirements inconsistent with those of other states." *Id.* As the Court recognized, such burdens on interstate commerce can exist even when a regulation has exactly the same impact on in-state and out-of-state businesses.[5]

While discussing only these two examples, the Court was careful to indicate that other sorts of burdens on interstate commerce, not at issue in the case before it,

---

[5] For example, a state regulation may even-handedly require ***all*** manufacturers who sell goods in a state to label them in a manner that would violate the labeling requirements of neighboring states. Such a rule may not give any commercial advantage to in-state businesses, yet may substantially impede interstate commerce by making it more difficult for out-of-state manufacturers to import their products and for in-state manufacturers to export their products. Such a regulation burdens ***interstate commerce***, even if it does not disparately burden ***out-of-state firms.***

also could trigger *Pike* balancing. The Court cited *Pacific Northwest Venison Producers v. Smith*, 20 F.3d 1008 (9th Cir. 1994), in support of this point. There, the Ninth Circuit concluded, after its "review of recent Supreme Court decisions," that "certain types of impacts on interstate commerce are of special importance in the balance with the state's putative interests." *Id.* at 1015. According to the Ninth Circuit, these burdens include "the disruption of travel and shipping due to a lack of uniformity of state laws," "impacts on commerce beyond the borders of the defendant state," ***and*** "impacts that fall more heavily on out-of-state interests." *Id.* That list was not exhaustive: the Ninth Circuit suggested that a law can trigger *Pike* balancing ***whenever*** it affects interstate commerce in a manner that implicates "the purpose of the Commerce Clause . . . to protect the nation against economic Balkanization." *Id.* Thus, *NEMA* clearly does not support the district court's decision to "restrict [its] inquiry to evidence of a disparate impact of the regulations on in-state and out-of-state private businesses." SPA-56.

The district court also relied on *Freedom Holdings*, which cited the above-quoted language in *NEMA*. In *Freedom Holdings*, the Court did focus its analysis under *Pike* on the question whether the legislation at issue favored in-state commercial interests over out-of-state commercial interests. 357 F.3d at 216. However, the Court did not state that disparate treatment of in-state and out-of-state businesses is the ***only*** impact on interstate commerce that qualifies as a

"burden" under *Pike.* Accordingly, *Freedom Holdings* does not contradict prior decisions in which this Court recognized that other sorts of restrictions on interstate commerce are sufficient to trigger *Pike* balancing.

II. THE COUNTIES' FLOW CONTROL ORDINANCES ARE UNCONSTITUTIONAL UNDER *PIKE*

A. The Flow Control Provisions Heavily Burden Interstate Commerce

Because the district court imposed a threshold requirement that the flow control provisions treat out-of-state businesses less favorably than in-state businesses, it simply ignored the other types of burdens on interstate commerce that the flow control provisions impose. These burdens are considerable.

In *Carbone*, the Supreme Court observed that Clarkstown's flow control ordinance "prevents everyone except the favored local operators from performing the initial processing step" and thus "deprives out-of-state businesses of access to the local market." *Carbone*, 511 U.S. at 389. The Counties' flow control provisions impose analogous burdens on interstate commerce.

First, the flow control provisions prevent haulers and generators from transporting their waste to out-of-state facilities, even when using those facilities best suits their business needs. In the absence of flow control, "most solid waste markets would be interstate, especially those in the northeast where land costs and population densities are high." A-206; *see also* A-272-279 (report on the interstate

movement of municipal solid waste). Several plaintiffs had used or planned to use out-of-state disposal facilities before the flow control ordinances went into effect or had identified out-of-state landfills that they could use in the absence of flow control. *See* A-203, A-285-286, A-301-303, A-326-327, A-658-660. Even if the County lowered its tipping fee below its monopolistic level, some haulers and generators undoubtedly would choose other facilities that were more conveniently located, provided better rates or services, or were otherwise better suited than the Counties' facilities to handle the haulers' waste streams.

This efficient flow of commerce between in-state haulers and out-of-state providers of waste processing and disposal services, which occurs in substantial volume throughout the country (*see* A-272-279), is foreclosed by the flow control provisions, which require the haulers to deliver all of their waste and pay monopolistic tipping fees to the Authority. *See* A-362. This type of burden clearly implicates the Commerce Clause; indeed, the Supreme Court always has "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could be more efficiently performed elsewhere." *Pike*, 397 U.S. at 145 (*quoted in Granholm v. Heald*, 125 S. Ct. 1885, 1897 (2005)).

Second, the flow control provisions "'squelch[] competition in the waste-processing service altogether, leaving no room for investment from outside.'"

Carbone, 511 U.S. at 405. Under the current law, no rational outside investor will build a new transfer, recycling, or disposal facility in or near the Counties: because the flow control provisions require delivery of all waste to the County's designated facilities, no such private facility is likely to survive. A-215 ("No private investor will choose to locate within the counties if local waste is inaccessible."). If the flow control provisions were eliminated, however, private firms might construct new facilities within the Counties that could attract ***both*** waste generated within the Counties ***and*** waste generated outside the Counties. Such interstate commerce also is restricted by the flow control provisions.

The fact that the Authority currently contracts for the out-of-County disposal of the non-recyclable waste from its transfer stations does not eliminate the burden on interstate commerce imposed by the Counties' flow control laws. The Counties' waste management plan calls for construction of a local landfill capable of handling all of the Counties' non-recyclable waste. *See* Dkt. No. 15, Ex. E, at 122 (*United Haulers I* App. 210). The Authority's agreements with non-local landfills are stop-gap measures that will be discontinued when that facility is completed. *See id.* at 122-123 (*United Haulers I* App. 211).[6] At that point, all

[6] According to the Authority's website, construction of the planned landfill began in July 2004 and is scheduled for completion in December 2006. The landfill will then begin operations early in 2007. *See* http://www.ohswa.org/landfill/index.html.

non-recyclable waste generated in the Counties will be taken to that facility, and out-of-state facilities will have no access whatever to the local market.

Even assuming that the Authority continues to entertain periodic bids from in-state and out-of-state facilities to handle the Counties' waste, the "bottleneck" created by the flow control provisions nonetheless constitutes a substantial impediment to interstate commerce. First, although qualified out-of-state firms can compete for the right to provide ***disposal*** services to the Authority, the Authority's designated facilities monopolize the initial processing step. Put another way, the flow control provisions entirely prohibit the export of ***unprocessed*** waste from the Counties for handling by out-of-state firms.

Second, the flow control laws require haulers to deliver all curbside recyclables to the Authority's Recycling Center in Oneida County, for sale by the Authority. *See* A-281-282. Out-of-state firms are completely foreclosed from competing for the business of collecting, processing, and reselling this valuable portion of the Counties' waste stream. *See* A-309-310.

Third, even as to the Counties' residual waste, interstate commerce is restricted. When the Authority selects an in-state disposal site for its non-recyclable waste, *ipso facto* interstate transportation of that waste stream ceases during the term of the contract. Since 1998, in fact, the Counties' residual waste has been taken to a New York landfill. *See* Dkt. No. 148, Ex. 30, at 2. The single-

buyer regime also systematically excludes many out-of-state firms from the market, including smaller companies and niche players that are not qualified to bid for the Authority's contracts. *See* A-203-204.

Finally, under *Pike*, "the practical effect of [the challenged ordinance] must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, jurisdiction adopted similar legislation." *Carbone*, 511 U.S. at 406 (O'Connor, J., concurring) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)) (brackets omitted); *see also*, *e.g.*, *Minnesota v. Barber*, 136 U.S. 313, 321 (1890) (striking down local meat inspection requirement because, *inter alia*, "the enactment of a similar statute by each one of the states composing the Union would result in the destruction of commerce among the several states"); *U & I Sanitation*, 205 F.3d at 1071-1072 (court must not look only at "the particular ordinance at issue and its effects upon the particular parties before us," but must assume "that all cities . . . [have] enacted flow control ordinances like the one at issue"). Here, if "localities in [other] States impose the type of restriction on the movement of waste that [the Authority] has adopted, the free movement of solid waste in the stream of commerce will be severely impaired." *Carbone*, 511 U.S. at 406 (O'Connor, J., concurring).

As this Court aptly observed in *United Haulers I*:

> The Counties' waste management scheme creates a bottleneck. Within the bottle, private waste haulers compete for the opportunity to collect solid waste from individual and corporate generators located within the Counties. Once collected, the private waste haulers must deliver the waste to one of five-designated, Authority-owned processing facilities located within the Counties, the 'bottleneck.' . . . [O]nce the waste has been delivered, private waste disposal companies, both in-state and out-of-state, stand outside the bottle to bid . . . for the right to process and ultimately dispose of the waste delivered to the Counties' transfer station.

261 F.3d at 257. If every jurisdiction were to adopt this same scheme, then the efficient national market envisioned by the Framers would devolve into a series of isolated "bottles," with no waste crossing state or local boundaries without having first been transported to a central, publicly-controlled collection point and then exported pursuant to the locality's purchasing decisions. As Justice O'Connor stated in *Carbone*, that is precisely "the type of balkanization the Clause is primarily intended to prevent." *Carbone*, 511 U.S. at 406 (O'Connor, J., concurring).[7]

---

[7] In *Randy's Sanitation v. Wright County, Minn.*, 65 F. Supp. 1017, 1027 (D. Minn. 1999), the court observed:

> Out-of-state facilities will often be cheaper than in-state facilities, particularly those in areas marked by free trade in waste; as a result, out-of-state facilities would quickly reach their maximum capacities. Because the opening of new landfills is politically unpopular – especially landfills which serve only out of state interests – over the long run out-of-state placement would become unavailable. This would obviously inflict a severe burden on interstate commerce.

B. The Burdens On Interstate Commerce Imposed By The Flow Control Provisions Are Excessive In Comparison To The Putative Local Benefits

Under the *Pike* test, an evenhanded regulation that affects interstate commerce only incidentally "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. As discussed above, the flow control provisions substantially burden interstate commerce by, among other things, (1) preventing in-state processors and haulers from obtaining waste handling and disposal services from out-of-state firms; (2) preventing outside investment in in-state waste processing and disposal facilities; (3) requiring all waste to pass through the designated local facilities before leaving the state; and (4) precluding out-of-state firms from processing and selling recyclables. The resulting "Balkanization" of the waste handling and disposal market is not justified by flow control's benefits.

The Counties' waste management plan has many laudable goals, including the elimination of substandard local landfills and the provision of reliable and environmentally-sound waste disposal services to the community. *See, e.g.,* A-116-119, A-122-123. The principal purpose of the ***flow control provisions*** is much narrower. By mandating delivery of waste to the Authority's designated facilities, the flow control provisions guarantee waste volume to those facilities while making it possible for the Authority to charge above-market "tipping fees." *See,*

e.g., A-787-788. This ensures that the facilities generate sufficient review to finance the Authority's operations, avoiding any need for the Authority to rely on general tax revenues.

It is widely understood that flow control measures serve as financing mechanisms for the designated facilities. *See Carbone*, 511 U.S. at 405 (O'Connor, J., concurring) (purpose of Clarkstown's flow control ordinance was "to ensure the financial viability of the transfer facility"); *see also, e.g.,* A-170 (memo explains that flow control is necessary "to assure that sufficient waste is received" at a facility to "cover financing costs"). The Counties' flow control laws are no exception. Plaintiffs' expert Mark Berkman concluded that the objectives of the laws were "1) to protect Oneida County's existing and proposed future investments; 2) to finance recycling facilities . . . and other non-self-sufficient services without additional taxation; and 3) to protect a government-run landfill from open market competition." A-213. *See also, e.g.,* A-331 (letter from the Authority's Executive Director notes that "[a]ll the revenues" to pay for the Authority's facilities and services "come from the fee for disposal of non-recyclable waste"); A-334 ("If haulers stop delivering garbage to our local waste management system, we will no longer receive the funds to support all these services.").

Both the documentary evidence and the deposition testimony confirmed that the Counties' flow control provisions were motivated by financial concerns. Before the flow control provisions were adopted, for example, proponents of the measures acknowledged that "a specific objective was to alleviate the County tax burden" (A-338) and that "[t]he ability to finance and then operate [the Authority] facilities depends upon the legal commitment of the [Counties'] waste." A-340. The Executive Director of the Authority observed in a 1991 letter that "[w]hen waste is taken out of the Authority system it also diverts the revenue needed to operate Authority facilities and services." A-331. Plaintiffs' expert admitted that "[b]ecause of flow control it is possible for the Authority . . . to impose a fee which is above the marginal cost of disposal," generating "funds that can be utilized to carry out some of the other aspects of the integrated waste management program." A-787-788.

As Justice O'Connor noted in *Carbone*, analysis under *Pike* must consider both the nature of the local purpose and whether it "can be achieved by other means that would have a less dramatic impact on the flow of goods." 511 U.S. at 405 (O'Connor, J., concurring). The local interest at stake here generally is afforded little weight under the Commerce Clause: as the Supreme Court stated in *Carbone*, "revenue generation is not a local interest that can justify discrimination against interstate commerce." 511 U.S. at 393. In this case, the Counties' goal of

financing the Authority's operations does not justify putatively non-discriminatory flow control either, because that goal can be achieved without imposing such severe burdens on interstate commerce. *See* 511 U.S. at 405-406 (O'Connor, J., concurring); *U & I Sanitation*, 205 F.3d at 1070-1071.

First, the Authority could generate revenue by charging competitive rates at its facilities while making up for any shortfall in funding "through general taxes or municipal bonds." *Carbone*, 511 U.S. at 394. Other possible supplemental financing mechanisms include an alternative user fee system; a sales and use tax on waste disposal services; a waste hauler permit fee system; or any combination of the above. *See* A-216-217, A-731-734. Such financing mechanisms would have far "less impact on interstate commerce" than the flow control ordinances. A-216.

Second, to guarantee waste volume, the Authority could enter into long-term contracts with haulers that offer favorable rates in exchange for volume commitments. Indeed, by 1998 the Authority had entered into 150 long-term waste delivery contracts with private haulers. *See* Dkt. No. 148, Ex. 27, at 25. The Authority's Executive Director, Hans Arnold, admitted that such contracts could be used to finance the Authorities' operations without resorting to flow control. A-597.

In short, the Counties' purposes "can be achieved by other means that would have a less dramatic impact on the flow of goods." *Carbone*, 511 U.S. at 405 (O'Connor, J., concurring). Because the flow control ordinances impose burdens that are excessive in relation to their benefits, they violate the Commerce Clause.

CONCLUSION

The Court should reverse the district court's order and direct that judgment be entered in favor of plaintiffs. At a minimum, the Court should reverse the decision below and remand the case to the district court with instructions that it conduct the balancing of benefits and burdens required under *Pike.*

Respectfully submitted.

EVAN M. TAGER
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Plaintiffs-Appellants

July 2005