

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1185

JAMES S. GILMORE, et al.,

Defendants-Appellants,

v.

WASTE MANAGEMENT HOLDINGS, INC., et al.

Plaintiffs-Appellees.

**On Appeal From The United States District Court
For The Eastern District of Virginia (Richmond Division)**

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 21

I. THIS ACTION IS NOT BARRED BY STATE SOVEREIGN IMMUNITY 23

 A. The County Is A Proper Plaintiff 23

 B. The Governor Is A Proper Defendant 25

 C. The Claims Are Not Barred By Eleventh Amendment Immunity .. 25

II. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE 26

 A. Plaintiffs Have Suffered Legal Injury 26

 B. Plaintiffs Were Not Obligated To Seek An Increase In Their Tonnage Allotments Before Challenging The Cap 29

 C. The Statutory “Savings Clauses” Do Not Render This Lawsuit Premature 31

III. CONGRESS DID NOT AUTHORIZE STATES TO DISCRIMINATE AGAINST OUT-OF-STATE WASTE 34

IV. THE CHALLENGED PROVISIONS VIOLATE THE COMMERCE CLAUSE. 36

 A. The Challenged Provisions Are Subject To Strict Scrutiny 38

 1. The challenged provisions have a discriminatory purpose .. 38

 2. The challenged provisions are discriminatory in practical effect 45

TABLE OF CONTENTS - Cont'd

	Page
a. The cap	46
b. The restrictions on barging	48
c. The truck provisions	50
B. The Challenged Provisions Cannot Survive Strict Scrutiny	53
1. The justification advanced by defendants is a sham	53
2. Even if the Commonwealth’s purported health and safety justifications were genuine, they would not survive strict scrutiny	57
a. The cap	58
b. The barging restrictions	62
c. The truck provisions	63
V. THE BARGING RESTRICTIONS ARE PREEMPTED	64
A. Federal Laws Governing Commercial Shipping Preempt Virginia’s Ban On Barging MSW	65
B. The Limitations On Stacking Of Containers Conflict With Federal Law Establishing Load Lines For Vessels	69
VI. THE COURT PROPERLY STRUCK DEFENDANTS’ AFFIRMATIVE DEFENSE	70
CONCLUSION	72

TABLE OF AUTHORITIES

Page(s)

Cases:

<i>Alden v. Maine</i> , 119 S. Ct. 2240 (1999)	26
<i>Associated Indus. v. Lohman</i> , 511 U.S. 641 (1994)	53
<i>Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders</i> , 48 F.3d 701 (3d Cir. 1995)	28
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	38, 52
<i>Baldwin v. G.A.F. Seelig, Inc.</i> , 294 U.S. 511 (1935)	71
<i>Best & Co. v. Maxwell</i> , 311 U.S. 454 (1940)	45
<i>Beveridge v. Lewis</i> , 939 F.2d 859 (9th Cir. 1991)	64, 66
<i>Board of Educ. v. Allen</i> , 392 U.S. 236 (1968)	24
<i>Bob’s Home Serv., Inc. v. Warren County</i> , 755 F.2d 625 (8th Cir. 1985)	30
<i>C & A Carbone, Inc. v. Town of Clarkstown</i> , 511 U.S. 383 (1994)	<i>passim</i>
<i>Camps Newfound/Owatonna, Inc. v. Town of Harrison</i> , 520 U.S. 564 (1997)	28, 29, 46

TABLE OF AUTHORITIES - Cont'd

	Page(s)
<i>Carey v. Population Servs., Int'l</i> , 431 U.S. 678 (1977)	23
<i>Chambers Med. Techs. v. Bryant</i> , 52 F.3d 1252 (4th Cir. 1995)	<i>passim</i>
<i>Chemical Waste Management, Inc. v. Hunt</i> , 504 U.S. 334 (1992)	37, 45, 47, 55
<i>City of Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978)	<i>passim</i>
<i>Concerned Residents v. Board of Supervisors</i> , 449 S.E.2d 787 (Va. 1994)	27
<i>Concerned Taxpayers v. County of Brunswick</i> , 455 S.E.2d 712 (Va. 1995)	27
<i>Container Corp. v. Mecklenburg County</i> , 1995 WL 360185 (W.D.N.C. June 22, 1992)	34
<i>CSX Transp., Inc. v. Board of Public Works</i> , 138 F.3d 537 (4th Cir.), <i>cert. denied</i> , 525 U.S. 821 (1998)	25
<i>Dean Milk Co. v. City of Madison</i> , 340 U.S. 349 (1951)	55, 57
<i>Director, Office of Worker's Compensation Programs v. Bethlehem Mines Corp.</i> , 669 F.2d 187 (4th Cir. 1982)	44
<i>Douglas v. Seacoast Prods., Inc.</i> , 431 U.S. 265 (1977)	65, 67
<i>Eastern Ky. Resources v. Fiscal Court of Magoffin County</i> , 127 F.3d 532 (6th Cir. 1997), <i>cert. denied</i> , 523 U.S. 1072 (1998)	42

TABLE OF AUTHORITIES - Cont'd.

	Page(s)
<i>Environmental Tech. Council v. Sierra Club</i> , 98 F.3d 774 (4th Cir. 1996)	<i>passim</i>
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	25
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	67
<i>Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources</i> , 504 U.S. 353 (1992)	37, 46, 55
<i>Gasperini v. Center for Humanities, Inc.</i> , 518 U.S. 415 (1996)	40
<i>Gibbons v. Ogden</i> , 22 U.S. (9 Wheat.) 1 (1824)	66
<i>Government Suppliers Consolidating Servs., Inc. v. Bayh</i> , 975 F.2d 1267 (7th Cir. 1992)	37, 48
<i>Great Atl. & Pac. Tea Co. v. Cottrell</i> , 424 U.S. 366 (1976)	59
<i>Guy v. City of Baltimore</i> , 100 U.S. (10 Otto) 434 (1879)	37
<i>Harvey & Harvey, Inc. v. County of Chester</i> , 68 F.3d 788 (3d Cir. 1995)	34
<i>Hughes v. Alexandria Scrap Co.</i> , 426 U.S. 794 (1976)	28
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)	36, 56, 61

TABLE OF AUTHORITIES - Cont'd.

	Page(s)
<i>Huish Detergents, Inc. v. Warren County</i> , 2000 WL 690173 (6th Cir. May 31, 2000)	29
<i>Hunt v. Washington State Apple Advertising Comm'n</i> , 432 U.S. 333 (1977)	38, 48
<i>Hutchins v. District of Columbia</i> , 188 F.3d 531 (D.C. Cir. 1999)	56
<i>Huus v. New York & Porto Rico S.S. Co.</i> , 182 U.S. 392 (1901)	65
<i>Idaho v. Coeur d'Alene Tribe</i> , 521 U.S. 261 (1997)	26
<i>In re Southeast Ark. Landfill, Inc.</i> , 981 F.2d 372 (8th Cir. 1992)	34, 37
<i>Jackson v. Okaloosa County</i> , 21 F.3d 1531 (11th Cir. 1994)	30
<i>Kassel v. Consolidated Freightways Corp.</i> , 450 U.S. 662 (1981)	49, 63
<i>Lawrence County v. Lead-Deadwood School Dist.</i> , 469 U.S. 256 (1985)	24
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986)	44, 55, 56
<i>Medigen of Ky., Inc. v. Public Serv. Comm'n</i> , 985 F.2d 164 (4th Cir. 1993)	55
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	38

TABLE OF AUTHORITIES - Cont'd.

	Page(s)
<i>Monell v. Dep't of Social Services</i> , 436 U.S. 658 (1978)	24
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992)	25
<i>Muth v. United States</i> , 1 F.3d 246 (4th Cir. 1993)	33
<i>National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management</i> , 910 F.2d 713 (11th Cir. 1990), <i>as modified upon denial of reh'g</i> , 924 F.2d 1001 (11th Cir. 1991)	37
<i>National Solid Wastes Management Ass'n v. Meyer</i> , 63 F.3d 652 (7th Cir. 1995)	37
<i>National Solid Wastes Management Ass'n v. Voinivich</i> , 959 F.2d 590 (6th Cir. 1992)	57
<i>National Solid Waste Management Ass'n v. Williams</i> , 877 F. Supp. 1367 (D. Minn. 1995)	40
<i>New Energy Co. v. Limbach</i> , 486 U.S. 269 (1988)	46, 53, 71
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982)	40
<i>Oregon Waste Sys., Inc. v. Department of Env'tl. Quality</i> , 511 U.S. 93 (1994)	36, 37
<i>Puget Sound Stevedoring Co. v. Tax Comm'n</i> , 302 U.S. 90 (1937)	67
<i>Ray v. Atlantic Richfield Co.</i> , 435 U.S. 151 (1978)	65, 68

TABLE OF AUTHORITIES - Cont'd.

	Page(s)
<i>Raymond Motor Transp., Inc. v. Rice</i> , 434 U.S. 429 (1978)	63
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429 (1980)	28
<i>Rogers v. Frito-Lay, Inc.</i> , 611 F.2d 1074 (5th Cir. 1980)	44
<i>Scott-Harris v. City of Fall River</i> , 134 F.3d 427 (1st Cir. 1997), <i>rev'd</i> , 523 U.S. 44 (1998)	41
<i>Secretary of State v. J.H. Munson Co.</i> , 467 U.S. 947 (1984)	31
<i>Seminole Tribe v. Florida</i> , 517 U.S. 44 (1996)	26
<i>Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel</i> , 20 F.3d 1311 (4th Cir. 1994)	28
<i>Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth.</i> , 877 F. Supp. 935 (M.D. Pa. 1994)	35
<i>South-Central Timber Dev., Inc. v. Wunnicke</i> , 467 U.S. 82 (1984)	35
<i>South Macomb Disposal Auth. v. Township of Washington</i> , 790 F.2d 500 (6th Cir. 1986)	24
<i>Southern Pacific Co. v. Arizona</i> , 325 U.S. 761 (1945)	49
<i>Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources</i> , 801 F. Supp. 725 (M.D. Ga. 1992)	31

TABLE OF AUTHORITIES - Cont'd.

	Page(s)
<i>SSDS, Inc. v. South Dakota</i> , 47 F.3d 263 (8th Cir. 1995)	40
<i>Sylvia Dev. Corp. v. Calvert County</i> , 48 F.3d 810 (4th Cir. 1995)	39
<i>United States v. Locke</i> , 120 S. Ct. 1135 (2000)	64, 70
<i>Valero Terrestrial Corp. v. McCoy</i> , 36 F. Supp.2d 724 (1997), <i>vacated in part as moot</i> , 50 F. Supp.2d 564 (N.D. W.Va. 1999), <i>affirmed in part</i> , <i>vacated in part</i> , 211 F.3d 112 (4th Cir. 2000)	50
<i>Village of Arlington Heights v. Metropolitan Housing Dev. Corp.</i> , 429 U.S. 252 (1977)	39
<i>Washington v. Seattle School Dist. No. 1</i> , 458 U.S. 457 (1982)	24
<i>Waste Sys. Corp. v. County of Martin</i> , 985 F.2d 1381 (8th Cir. 1993)	34
<i>White v. Massachusetts Council of Constr. Employers, Inc.</i> , 460 U.S. 204 (1983)	28
<i>Williamson v. United States Dep't of Agric.</i> , 815 F.2d 368 (5th Cir. 1987)	43
<i>Wyoming v. Oklahoma</i> , 502 U.S. 437 (1992)	38, 52
<i>Yamaha Motor Corp., U.S.A v. Calhoun</i> , 516 U.S. 199 (1996)	65

TABLE OF AUTHORITIES - Cont'd.

Page(s)

Statutes and Regulations:

U.S. Const. art. I, § 8, cl. 1, 3	66
Port and Waterways Safety Act (“PWSA”), 33 U.S.C. §§ 1221 <i>et seq.</i>	66
Shore Protection Act of 1988 (“SPA”), 33 U.S.C. §§ 2601 <i>et. seq.</i>	66
33 U.S.C. § 2603	66
33 U.S.C. § 2622	67
42 U.S.C. § 6947	35, 36
46 U.S.C. § 3301.....	66
46 U.S.C. § 3305.....	66
46 U.S.C. § 3306.....	66
46 U.S.C. § 5104	69
46 U.S.C. § 5105	69
46 U.S.C. § 5106	69
46 U.S.C. § 5112	69
46 U.S.C. § 12103	65
46 U.S.C. § 12106	65
33 C.F.R. Part 160	66
46 C.F.R. Ch. I, Subchapter I	66
46 C.F.R. § 67.3	65

TABLE OF AUTHORITIES - Cont'd.

	Page(s)
46 C.F.R. § 42.07-35	69
46 C.F.R. § 42.07-45	69
46 C.F.R. § 42.09-15	69
46 C.F.R. § 42.09-35	69
46 C.F.R. §§ 170.001 <i>et seq.</i>	69
Va. Code Ann. § 10.1-1408.1	16
Va. Code Ann. § 10.1-1408.3	12
Va. Code Ann. § 10.1-1454.1	<i>passim</i>
Va. Code Ann. § 10.1-1454.2	16, 32
Va. Code Ann. § 10.1-1454.3	17, 18, 33
Va. Code Ann. § 15.2-932	26
Va. Code Ann. § 15.2-1404	24
9 VAC 20-80-250	59
9 VAC 20-120-130.D.2	54
N.C. Admin. Code tit. 15A, r. 13B.1202	54
 <u>Other:</u>	
H.R. REP. NO. 96-428 (1979), <i>reprinted in</i> 1980 U.S.C.C.A.N. 7162	65
H.R. REP. No. 94-1491 (1976), <i>reprinted in</i> 1976 U.S.C.C.A.N. 6238, 6247 ...	35

TABLE OF AUTHORITIES - Cont'd.

	Page(s)
10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 2722 (3d ed. 1998)	43

STATEMENT OF FACTS

This case raises a constitutional challenge to legislation enacted by Virginia's General Assembly with the express purpose of slowing the importation into Virginia of municipal solid waste ("MSW") generated elsewhere. On the heels of reports that Virginia had become the country's second biggest waste importer and that New York was planning to increase its waste exports, the General Assembly enacted a package of provisions designed, in the Governor's words, to prevent Virginia from becoming "the nation's dumping grounds." Consistent with the statute's purpose of reducing waste imports, each of the challenged provisions substantially burdens the importation of out-of-state MSW while having little or no effect on the transportation or disposal of in-state waste. The legislation caps daily waste disposal at the landfills that receive the lion's share of the out-of-state MSW, while effectively exempting local landfills from any growth restrictions; bans the use of barges for transporting MSW, thereby cutting off an efficient means of transporting large volumes of waste over long distances; and places restrictions on the tractor-trailers used to import large quantities of MSW, while exempting from regulation the smaller waste trucks that carry most of Virginia's MSW. There was no material dispute about the following facts presented to the district court.

1. *MSW Landfills in Virginia.* There are seven state-of-the-art "regional" landfills and 63 "local" landfills in Virginia that accept MSW. JA 497. Plaintiff

Waste Management Holdings, Inc. (“WMH”) operates five of the regional landfills (*id.*), and plaintiff Brunswick Waste Management Facility, Inc. (“Brunswick”) operates a sixth (JA 461). Each of the regional landfills was designed and constructed to meet or exceed stringent state or federal standards, including all requirements established by Subtitle D of the Resource Conservation and Recovery Act (“RCRA”). JA 468, 497, 888. By contrast, many of Virginia’s 63 “local” landfills do not meet Subtitle D standards and have been documented to be contaminating the groundwater. JA 513, 515-526.

Each of the regional landfills was constructed and is operated with private funds under a “host agreement” with the county in which it is located and a permit issued by the Virginia Department of Environmental Quality (“DEQ”). JA 468-469, 497-499. Under the host agreements, each regional landfill pays fees and provides free services to its host county. JA 498. The regional landfills were developed with the expectation that they would receive substantial daily volumes of MSW, including out-of-state MSW. JA 469, 498.

Each of the regional landfills in fact receives substantial quantities of waste generated outside of Virginia. JA 499. According to a November 1998 report issued by DEQ, more than 70% of the MSW received by the seven regional landfills was generated outside Virginia, accounting for 97% of Virginia’s imported waste. JA 499-

500, 511. By contrast, only 10 of the 63 local landfills receive any out-of-state waste, and those receive only 3% of Virginia's total waste imports. *Id.*

2. *The Use of Barges to Transport MSW to Virginia.* Container barges are widely viewed as an efficient, safe, and economical means of transporting MSW. JA 500. Accordingly, hundreds of thousands of tons of MSW are shipped on U.S. waterways each year. JA 465. WMH developed and has operated a facility on the James River in Virginia ("the James River facility") as a port to receive containerized MSW from barges. JA 500-501.

In 1998, the Virginia General Assembly enacted legislation requiring that solid waste transported by vessel be carried in containers designed, constructed and operated to prevent the escape of their contents. Va. Code Ann. § 10.1-1454.1.F. The 1998 enactment also required DEQ to promulgate regulations to protect human health and safety and "to protect the Commonwealth's environment and natural resources from pollution, impairment or destruction" as a result of the water-borne transport of solid waste. *Id.* § 10.1-1454.1.A. These regulations had not yet been finalized when the General Assembly enacted the legislation challenged here.

3. *WMH's Contracts to Dispose of Waste Generated in New York City.* For several decades, New York City has disposed of its residential MSW at the Fresh Kills landfill in Staten Island. JA 472. In 1997, Mayor Rudolph Giuliani announced that

the Fresh Kills landfill would cease receiving waste by December 31, 2001. *Id.* Thereafter, the New York City Department of Sanitation began to seek interim contracts for the disposal of residential MSW elsewhere. JA 473. WMH was awarded several of these interim contracts and began transporting a significant amount of this waste to its Virginia landfills. *Id.* WMH also submitted a proposal for a long-term contract to dispose of up to 12,000 tons per day of New York's residential MSW after the closing of Fresh Kills. JA 474. The proposal contemplated sending a significant quantity of the waste to landfills in Virginia. *Id.*

WMH also receives for disposal approximately 8,000 to 10,000 tons per day of commercial MSW (*i.e.*, waste from stores, restaurants, and other non-industrial sources) generated in the New York City area. JA 490. In 1998, WMH decided to begin transporting some of this waste to Virginia by barge. *Id.* It entered into negotiations with plaintiff Hale Intermodal Marine Company to barge the MSW to the James River facility, with the expectation of beginning barging in March or April 1999. JA 491. WMH also purchased 400 double-walled steel containers designed to meet the standards set forth in Va. Code § 10.1-1454.1. *Id.* These containers are substantially sturdier than conventional containers and are more protective of the environment than many of the vessels that are routinely used to ship commodities more hazardous than MSW on Virginia's waterways. JA 465-466.

4. *Virginia's Hostile Reaction to the Increased Importation of Out-of-State MSW.* In June 1998, DEQ released a report indicating that Virginia had imported 788,000 tons of solid waste in the fourth quarter of 1997 and that most of the waste was being disposed of at the regional landfills. JA 564-565. This information, combined with reports that WMH planned to ship increasing amounts of New York MSW to Virginia, triggered an almost-immediate “not-in-my-backyard” response by the Commonwealth’s legislators and public officials. In July 1998, for example, Senator William T. Bolling wrote to Attorney General Mark Earley:

With the impending closure of the Fresh Kills Landfill in New York, I am concerned that the pressure for additional importation will increase even more in the next few years. If it is legally possible to do so, I would like to introduce legislation during the 1999 session of the General Assembly that would place restrictions on such importations.

JA 576.

Further impetus for a legislative attack on out-of-state waste was supplied barely a month later, in August 1998, when the Congressional Research Service released a report indicating that Virginia had become the second largest importer of MSW, disposing of 2.8 million tons of out-of-state solid waste per year. JA 582.

Consistent with the intention expressed in his July letter to the Attorney General, on September 30, 1998, Senator Bolling announced that he would introduce solid waste legislation in the upcoming legislative session. In the memorandum

describing his proposals, he stated that Virginia “is currently the second largest importer of out of state waste in the nation”; that “the pressure to import larger amounts of out of state waste to Virginia will increase dramatically in the next few years”; that WMH “recently announced a new contract with New York City that could bring up to 2,400 tons of garbage a day to Virginia,” most of which “will be transported by barge on Virginia’s waterways”; and that “the vast majority” of garbage “currently disposed of in the Fresh Kills landfill * * * may be heading to Virginia.” JA 601.

On the same day, Senator Bolling issued a press release stating in part:

There is tremendous excess capacity in Virginia’s landfills today. If we don’t act now to cap the total amount of waste that can be disposed of in Virginia’s landfills, the amount of waste being brought to Virginia from other states will increase significantly in the next few years. Such caps are the only effective way of limiting the amount of waste that is being imported to Virginia, and preserving our current landfill capacity for future generations of Virginians.

JA 607. Senator Bolling specifically noted that “the pressure to import solid waste to Virginia would increase significantly * * * with the impending closure of the Fresh Kills landfill” and that WMH was “making a \$20 million investment in” the James River facility. JA 606.

In November 1998, DEQ submitted a report on the management of MSW in Virginia. The report observed that the seven regional landfills accounted for 97% of

the imported MSW and that 70% of the waste received by those facilities was imported. JA 503, 505, 511. Soon after receiving the report, Governor Gilmore imposed a moratorium on new landfill development and instructed his Secretary of Natural Resources to “make recommendations to me for consideration at the next regular session of the General Assembly.” JA 610. Later that month, House Speaker Thomas Moss asked, “If out-of-state trash is such a good thing, why doesn’t New York State keep it there?” JA 40, 152.

Meanwhile, Virginia’s status as a leading importer of waste and the plans of WMH to dispose of New York MSW in Virginia were becoming widely publicized. In January 1999, the Center for Public Policy at Virginia Commonwealth University announced that, “[b]y a margin of nearly ten to one, Virginians favor limiting the amount of out-of-state garbage coming into Virginia.” JA 611. Also in January, *The Washington Post* reported that WMH planned to ship 3,900 tons per day of New York MSW by barge to the Charles City County Landfill. JA 614-615. In response, Senator Bolling stated that “[t]his ratchets up the importance of the General Assembly doing something substantive this year to address the problem.” JA 96, 173. Governor Gilmore’s press secretary announced that the Governor was “outraged that this additional garbage is coming into the Commonwealth” and would call for legislation limiting imports of out-of-state waste. *Id.*

Delivering his State of the Commonwealth address the next day, Governor Gilmore stated that he was “deeply concerned about the importation of out-of-state trash,” specifically noting that “a major company [had] announced plans to import four thousand more tons of New York City trash into Virginia per day.” JA 630. He added:

I believe the Commonwealth has a right — and I would say a duty — to ban the use of barges for the transportation of garbage on Virginia’s waterways! I’ll ask the General Assembly to enact such a ban to impose tough new permit requirements on the construction or expansion of new landfill space, caps on the amount of waste that can be deposited in Virginia landfills, and increased inspections of waste being hauled by truck or other means.

Id.

A few days later, the Governor publicly released a letter to Mayor Giuliani. JA 633-634. Among other things, the letter stated:

I am greatly concerned by your recent comments regarding the transport of New York City’s municipal waste to Virginia and the policy you announced in December to increase exports of waste to neighboring states. * * * Let me assure you that the home state of Washington, Jefferson, and Madison has no intention of becoming New York’s dumping grounds.

Over the past two weeks, one company in Virginia has tripled its shipment of New York’s municipal waste to Virginia landfills to approximately 3,000 tons a day. The company also reports that it expects shipments to increase to roughly 2.2 million tons per year by 2002. Already, Virginia ranks as the second largest importer of municipal solid waste, behind only Pennsylvania. This is highly unacceptable.

Id.

The following week, Governor Gilmore announced that he was proposing, and that Senator Bolling would be the Chief Patron of, three solid waste bills, stating:

The home state of Washington, Jefferson, and Madison has no intention of becoming the nation's dumping grounds. * * * That is why I've asked Senator Bolling to sponsor these bills that will increase state regulations on landfills, cap daily landfill deposits, and ban trash barges on Virginia's waterways.

JA 635.

Senator Bolling promptly followed with a memo to the members of the Solid Waste Subcommittee of the Senate Committee on Agriculture, Conservation, and Natural Resources (the "Solid Waste Subcommittee"), stating:

Earlier this year, the [DEQ] published their first written report quantifying the amount of waste that was being placed in Virginia's landfills. Surprisingly, this report indicated that Virginia was receiving 3.2 million tons of garbage from other states, primarily New York. * * * Virginia was identified as the second largest importer of waste in the nation.

Unfortunately, the amount of garbage being imported to Virginia has grown dramatically in the past year. That is primarily due to the impending closure of the Fresh Kills landfill in New York City, and the fact that Waste Management, Inc., who owns most of the large regional landfills in Virginia, has received the contract to handle the relocation of the Fresh Kills waste stream. * * *

* * * [T]hese large and increasing waste deposits are prematurely exhausting Virginia's limited landfill capacity. * * * [W]e may have to site an entire generation of new landfills in Virginia 20 years sooner than we would otherwise have to do simply because our current landfill space

is being filled up by waste from other states. * * *

* * * [T]hese waste deposits could create long term environmental problems for Virginia. * * * While we have no choice but to assume this burden for our own waste, we should feel no obligation to assume that burden for the waste of other states.

* * * I would suggest that becoming the nation's "King of Trash" is not consistent with the image we have tried to promote for Virginia. * * * How can we possibly promote Virginia as the Silicon Dominion of the 21st century while we stand idly by and allow Virginia to become the largest importer of garbage in the nation.

JA 637-638; *see also* JA 644-650. Meeting with the Solid Waste Subcommittee a few days later, Senator Bolling again made it clear that the legislation was designed to address the problem of out-of-state waste, stating:

[E]ven though the headlines in the newspapers talk about New York trash, it is not just a New York problem. It is a problem where this waste is now coming to Virginia from 24 other states and Puerto Rico.

JA 672.

While the General Assembly was considering the legislation, a group called Campaign Virginia was aggressively lobbying for limitations on out-of-state waste. Campaign Virginia sent letters to legislators emphasizing that Virginia was "**the #2 importer of trash** in the nation" and that "[t]he major waste companies are negotiating with New York City for the privilege of carting the 4.3 million tons of the

City's garbage." JA 1351 (emphasis in original).⁴ It ran radio advertisements encouraging voters to inform their legislators "that Virginia's had all the garbage we're going to take." JA 1353. The Sierra Club, too, encouraged voters to write members of the General Assembly that "Virginia citizens have said enough" to importation of out-of-state waste, and to request that legislators declare support for legislation "ban[ning] the barging of municipal solid waste on Virginia's waters." JA 1358.

The antipathy toward out-of-state MSW was exemplified in Delegate Donald L. Williams's speech on the floor of the General Assembly:

Do we want to be known as the capital of garbage?

Maybe we need a new bumper sticker — instead of "Virginia is for lovers," what about "Virginia is for garbage"? Or how about a special license plate with a dumpster on it?

Mr. Speaker, I do not believe we need to be the capital of garbage in our state. Do you believe any large corporation would locate in the garbage capital of the country?

What a message we are sending, buy a home, live in the great Commonwealth, the number one importer of garbage.

JA 1007. Each of Delegate Williams' questions was greeted with a chorus of "nos"

⁴ In an amicus brief filed with the district court, Campaign Virginia stated that, "[i]n pursuit of the legislation herein challenged, [it] contacted more than 300,000 people, from whom approximately 15,000 letters and several thousand telephone calls went to legislators." Doc. # 80, at 1.

from the assembled body (*id.*), which shortly thereafter enacted the legislation.

5. *Virginia Enacts Legislation That Effectuates Its Discriminatory Purpose.*

The legislation enacted by the General Assembly and signed by the Governor was carefully crafted to frustrate at every turn the stated plans of WMH for the transportation and disposal of New York waste. The provisions include:

a. *The cap.* Va. Code Ann. § 10.1-1408.3 (hereinafter “the cap”) provides in relevant part:

A. The amount of municipal solid waste received at any landfill authorized to accept such waste shall not exceed an average of 2,000 tons per day, or the documented average actual amount of municipal solid waste received by such landfill on a daily basis during 1998, * * * whichever is greater, unless the landfill has received approval from the [Virginia Waste Management] Board pursuant to subsection B for a larger tonnage allotment. * * *

B. In considering requests for increased tonnage allotments, the Board shall consider those factors set forth in Subsection D of § 10.1-1408.1 and other factors it deems appropriate to protect the health, safety and welfare of the people of Virginia and Virginia’s environmental and natural resources. No request for an increased tonnage allotment shall be approved by the Board until a public hearing on the proposed increase has been held in the locality where the landfill requesting the increase is located.

Six of the seven regional landfills that receive out-of-state waste have disposed of more than 2,000 tons per day of MSW in the past or are expected to do so in the near future. JA 500, 670. Thus, if it goes into effect, the cap will impose a real and substantial burden on all but one of the regional landfills. By contrast, none of the 63

local landfills receives anything close to 2,000 tons per day of waste, and only one or two of them can be expected ever to need or to want to exceed that amount. JA 500, 506-511. Thus, the cap allows the local landfills substantially to increase their daily waste receipts without confronting the burden and uncertainty of applying for a variance. The cap and the burdens associated with obtaining a variance from it are, in practical effect, reserved for the regional landfills that receive the vast bulk of the out-of-state waste disposed of in Virginia.

The discriminatory impact of the cap was no accident; it was carefully crafted to ensure that it would affect only the regional landfills. An early draft of the provision would have limited *all* landfills to a 5% increase over 1998 volumes. After local governments objected that this provision would unduly restrict the growth of local landfills, the bill was amended to allow the greater of 1998 volumes or 2,000 tons-per-day. JA 665; *see also* JA 1065-1067 (testimony of director of public waste authority that he expressed concerns to Senator Bolling that the original cap provision would adversely affect the local landfills). DEQ provided Senator Bolling with information confirming that the 2,000 tons-per-day cap would restrict the expansion of the regional landfills while having no impact on local landfills. JA 666, 1059-1060.

Senator Bolling made the discriminatory impact of the cap crystal clear to the General Assembly. He informed the Solid Waste Subcommittee that “[t]he vast

majority of [MSW] received at the seven regional landfills in Virginia comes from other states” (JA 667), and provided data showing that six of these seven landfills would be affected by the cap. JA 667-671. He also assured the Subcommittee that *only* those landfills would be affected, explaining that “[e]very other landfill in Virginia is significantly below 2,000 tons” and that “most local landfills in Virginia are below 100 tons a day.” JA 673.

b. *The prohibitions on transportation of MSW by vessel.* The General Assembly also amended Va. Code § 10.1-1454.1 to effectively prohibit the use of barges to transport MSW into Virginia. Governor Gilmore exposed the discriminatory motive underlying the amendments, stating at the time they were introduced: “Barge traffic is a cheap and easy way to import trash from far distances. If we can put the clamps on that, then we can address the issue of trucks.” JA 675.

One of the “clamps” adopted by the General Assembly was a modification of an existing requirement that the Board promulgate regulations governing the commercial transportation of solid waste on vessels upon the navigable waters of Virginia. Va. Code Ann. § 10.1-1454.1.A. As noted above, the Board was in the process of developing regulations under the 1998 enactment when the 1999 legislation amended that statute. Under the new law, the Board was directed to issue a regulation requiring that “containers [of solid waste] be stacked no more than two high on barges

***.” *Id.* § 10.1-1454.1.A(d) (the “container-stacking limitation”). The new statute further provided (for the first time) that “[n]o facility shall receive wastes regulated under subsection A by ship, barge or other vessel prior to the effective date of the regulations promulgated pursuant to subsection A.” *Id.* § 10.1-1454.1(B) (“the pre-regulation ban”).

Because the Board has no deadline to promulgate the regulations contemplated in Subsection A, the pre-regulation ban indefinitely prohibits the use of vessels to deliver MSW to Virginia. Moreover, even after regulations are promulgated, the container-stacking limitation will effectively prevent barging of waste to Virginia. Barges that carry containerized MSW ordinarily are loaded with containers stacked five high. JA 489. It would more than double the shipping costs per ton, and thus make it economically impracticable to ship MSW by barge, if the waste containers could be stacked only two high. JA 491.

Because shipment by barge is an efficient way of transporting large quantities of MSW over long distances (JA 500), the pre-regulation ban and the container-stacking limitation will substantially burden the importation of out-of-state waste. By contrast, because the only waste shipped by vessel in Virginia is a small amount generated on Tangier and other islands (JA 501), and because none of that waste is shipped on container barges (*id.*), these provisions will have virtually no effect on the

transportation of Virginia's waste.

Unsatisfied with the substantial hurdles imposed by the amendments to Section 10.1-1454.1, the General Assembly also specified that “the commercial transport of hazardous or nonhazardous solid waste * * * by ship, barge or other vessel upon the navigable waters of the Commonwealth is prohibited on the Rappahannock, James and York Rivers * * *.” Va. Code Ann. § 10.1-1454.2 (the “three-river ban”). This provision will prevent WMH from using barges to transport out-of-state MSW to its landfills in Virginia, but will have no impact on the only in-state solid waste that is shipped by vessel — the small amount that is generated on Tangier and other islands and shipped over the Chesapeake Bay. JA 501.

c. The burdens imposed on the interstate transportation of waste. Well aware that substantial amounts of out-of-state MSW are imported into Virginia on trucks having four or more axles, the General Assembly enacted restrictions on such vehicles that do not apply to the smaller two or three-axle vehicles that carry mostly Virginia waste.

First, the General Assembly prohibited landfill operators from accepting MSW from a vehicle with four or more axles “unless the transporter of the waste provides certification, in a form prescribed by the Board, that the waste is free of substances not authorized for acceptance at the facility.” Va. Code Ann. § 10.1-1408.1.Q (the

“certification requirement”). Because virtually all out-of-state MSW is delivered in vehicles having four or more axles (JA 482, 501-502), while the majority of Virginia MSW is delivered to landfills in vehicles with fewer than four axles (JA 484), the certification requirement imposes a disproportionate burden on the transportation of out-of-state waste.

Second, the General Assembly required the Board to develop regulations governing the “commercial transport” of MSW by “any tractor truck semitrailer combination with four or more axles.” Va. Code Ann. § 10.1-1454.3.A, D. Among other things, the new regulations must require that, as a condition of carrying MSW on Virginia roads, the owners of such trucks make financial assurances that trucks having less than four axles or carrying other cargo need not make. *Id.* § 10.1-1454.3.A(2). The regulations also must provide that containers and trailers carrying waste “be designed, constructed and maintained so as to * * * prevent the escape of wastes and liquids and to prevent the loss or spillage of wastes to the extent possible in the event of an accident” (*id.* § 10.1-1454.3.A(1)) and prohibit covered vehicles from transporting waste “unless the containers carried thereon are designed, constructed, loaded, operated and maintained in accordance with the regulations developed pursuant to subsection A.” *Id.* § 10.1-1454.3.C. The new provisions also include spill reporting and cleanup obligations, the violation of which is a Class 1

misdemeanor. *Id.* § 10.1-1454.3.B, C.

Five-axle tractor-trailers are used to carry waste from transfer stations to disposal sites, but are not used to collect waste from individual generators. JA 482. Virtually all of the out-of-state MSW transported by truck to Virginia goes through transfer stations and is delivered on commercially operated tractor-trailers having four or more axles. *Id.*; JA 501-502. By contrast, only about 24% of Virginia-generated waste is processed through transfer stations and loaded onto tractor trailers, and about one-quarter of that tonnage is carried by Southeastern Public Service Authority (“SPSA”), a public entity. JA 483. Because SPSA is arguably exempt from the provisions by the limitation to “commercial transport,” only about 18% of Virginia-generated waste is affected at all by the provision. *Id.* Thus, although the new provisions purport broadly to govern the “[t]ransportation of [m]unicipal [s]olid and [m]edical [w]aste by [t]ruck,” in fact they apply principally to trucks carrying MSW in interstate commerce, while leaving unregulated the transportation of at least 76%, and as much as 82%, of Virginia’s waste.

There can be little doubt that the discriminatory effect of the trucking provisions was intended. In his September 30, 1998 press release, Senator Bolling stated that the regulations required by his proposed legislation “should include minimum standards for the containers waste is transported in, as well as an aggressive inspection and

monitoring program to make sure that *waste coming to Virginia* is being transported appropriately.” JA 608 (emphasis added). His January 26, 1999 memo to the Solid Waste Subcommittee also signaled his goal of reducing the flow of interstate MSW, stating: “It is entirely possible that these regulations could have the impact of actually reducing garbage truck traffic on Virginia’s highways.” JA 642. Because the provisions carve out the traffic carrying the overwhelming majority of waste generated in Virginia, it is obvious that the reduction that Senator Bolling anticipated was in vehicles carrying *out-of-state* MSW. Governor Gilmore’s statement linking the regulation of trucking to the goal of reducing out-of-state waste (JA 675) confirms that he shared Senator Bolling’s discriminatory views.

4. *Proceedings below.* Plaintiffs filed complaints seeking injunctive and declaratory relief against Governor Gilmore and other state officials, alleging that the cap, the barging restrictions, and the trucking limitations violated the Commerce Clause and that the barging restrictions also were preempted by federal law.

The district court granted plaintiffs’ motion for a preliminary injunction against the cap and the barging restrictions, stating that “both sets of restrictions are almost certainly invalid under the Commerce Clause.” JA 131. According to the court:

[t]he timing of the General Assembly’s actions and the statements made by the legislation’s chief proponents, including Governor Gilmore, leave no room for doubt that it was enacted with one overriding purpose: to restrict the importation of out-of-state waste, particularly New York

waste, into the Commonwealth.

JA 134. The court also stated that “there is no question but that the practical effect of both the barging restrictions and the cap provision will be to burden the flow of out-of-state waste across Virginia’s borders while leaving in-state waste unaffected.” JA 135. *See also* JA 134 (finding that the provisions “are plainly discriminatory in both their purpose and ‘practical effect’”). This Court denied defendants’ motion for a stay of the preliminary injunction.

After discovery, the district court granted plaintiffs’ motion for summary judgment, holding each of the challenged provisions invalid under the Commerce Clause.⁵ Finding that “Virginia appears to have adopted measures that would frustrate or preclude the importation of MSW at every turn” (JA 1411), the court ruled that the provisions were subject to strict scrutiny, and that they plainly failed that test. First, the court held that defendants had failed to demonstrate “that no adequate, nondiscriminatory alternatives exist that would protect local interests just as well as the disputed statutes,” while plaintiffs — who were not obligated to do so — had “offered some possible alternatives to the disputed statutes.” JA 1412. Second, the court rejected Virginia’s contention that “the disputed statutes are demonstrably

⁵ Because the district court’s memorandum opinion did not mention the trucking restrictions, WMH filed a motion for clarification. The court confirmed that “[s]ummary judgment was granted as to the trucking provisions,” and that its memorandum opinion “appl[ied] fully” to those provisions. JA 1416.

justified by a valid factor unrelated to economic protectionism.” JA 1413 (internal quotation marks omitted). According to the court, “the tenor of public discussion * * * makes clear that Virginia was motivated by economic protectionism, and therefore any post-hoc efforts to shroud its actions in the cloak of environmental conservation and resource protection are ineffectual.” JA 1414.

SUMMARY OF ARGUMENT

The district court did not err by reaching the merits of this case. First, this action, which seeks declaratory and injunctive relief against state officials to prevent them from enforcing unconstitutional legislation, falls squarely within the *Ex parte Young* exception to state sovereign immunity. Neither defendants’ argument that Charles City County was not a proper plaintiff, nor their contention that the Governor should not have been named as a defendant, deprived the district court of jurisdiction to hear plaintiffs’ challenges to each of the provisions.

Second, the claims were clearly justiciable. Defendants cannot defeat standing by arguing that state law did not authorize the counties to agree to the development of landfills that would accept out-of-state waste; the Virginia Supreme Court has ruled that the host agreements were authorized by state law, and those laws would themselves violate the Commerce Clause if they were construed to prohibit the regional landfills from accepting out-of-state waste. The “market participant doctrine”

does not deprive plaintiffs of standing to challenge the restrictions imposed here because the State is not buying or selling waste disposal services at the regional landfills, and hence is in no sense a market participant. The existence of a procedure to seek a waiver of the cap does not render plaintiffs' challenge to the cap premature because plaintiffs were immediately burdened by the cap, despite the waiver provisions, and the waiver procedures themselves discriminatorily burden landfills accepting out-of-state waste. Finally, the so-called "savings clauses" — which are mere surplusage stating that state officials should not enforce provisions that are unconstitutional — do not deprive the plaintiffs of their right to seek prospective relief from the courts.

On the merits, the district court correctly ruled that each of the challenged provisions violates the Commerce Clause. The evidence was overwhelming that the legislation was enacted with the specific intent to discriminate against interstate commerce in waste. Each of the challenged provisions also has the practical effect of discriminating against out-of-state waste. Thus, the provisions cannot survive unless defendants prove that the measures are justified by a valid state interest unrelated to economic protectionism and that there are no less discriminatory alternatives to preserve the local interests at stake. The court below correctly held that the provisions fail this stringent test.

Although the district court found it unnecessary to reach the issue, the barging restrictions also are preempted by the federal laws that license barges carrying MSW to travel the nation's navigable waterways, ensure their safety, and regulate their maximum loads.

Finally, the district court properly struck defendants' frivolous affirmative defense relating to New York's alleged Commerce Clause violations.

I. THIS ACTION IS NOT BARRED BY STATE SOVEREIGN IMMUNITY.

Defendants contend (Br. 17) that this lawsuit is barred by principles of sovereign immunity. This argument is meritless.

A. The County Is A Proper Plaintiff.

Defendants first contend that Charles City County is not entitled to sue the Commonwealth. The district court found it unnecessary to address this argument, because it was "clear that each of the other plaintiffs have standing to raise the claims alleged." JA 243. *See Carey v. Population Servs., Int'l*, 431 U.S. 678, 682 & n.2 (1977).⁶

In any event, the County plainly is entitled to sue. First, the Supreme Court

⁶ Defendants contend (Br. 19 n.3) that the Commonwealth "should not be required to pay attorney's fees to the County," but this issue is not ripe for review. No plaintiff has yet filed a motion for attorney's fees, and the district court (which granted the parties' motion to extend the time for seeking attorney's fees until after the conclusion of this appeal) thus has not decided whether the County may recover such fees.

held in *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978), that “municipalities and other local governments” are “persons” subject to suit under Section 1983, and “in light of *Monell*, it would be a strained analysis to hold * * * that a municipal corporation was a ‘person’ within one clause of section 1983, but not a ‘person’ within another clause of the same statute.” *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 502 (6th Cir. 1986); *cf. Washington v. Seattle School Dist.*, 458 U.S. 457, 487 n.31 (1982) (ruling that state-funded school district was eligible to receive award of attorney’s fees under 42 U.S.C. § 1988 after prevailing in challenge to constitutionality of state statute).

Second, there is ample precedent for allowing political subdivisions to raise constitutional claims against states. *See, e.g., Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Seattle School Dist.*, 458 U.S. 457; *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985).

Third, each Virginia county is statutorily vested with the power to “sue or be sued in its own name in relation to all matters connected with its duties.” Va. Code Ann. § 15.2-1404. Defendants now argue that this provision does not waive the Commonwealth’s Eleventh Amendment immunity (Br. 18-19), but, as discussed below, the Eleventh Amendment does not bar the equitable claims asserted here.

B. The Governor Is A Proper Defendant.

Defendants contend that there is no jurisdiction to hear the claims against the Governor because he had no “special relation” to the statute. Br. 19 (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). As the district court found, however, “Governor Gilmore * * * actively and publicly defended the legislation at issue” and “is therefore a proper defendant.” JA 234. In any event, because plaintiffs also sued other state officials whose “special relation” to the legislation is not challenged, the dismissal of the Governor would make no difference to the resolution of this case.

C. The Claims Are Not Barred By Eleventh Amendment Immunity.

Nearly a century ago, the Supreme Court held in *Ex parte Young* that the Eleventh Amendment does not prohibit a suit in federal court for injunctive relief to prevent state officials from engaging in ongoing violations of federal law. The Supreme Court and the Fourth Circuit have repeatedly relied on *Ex parte Young* to enjoin unconstitutional state action in circumstances indistinguishable from this case. *E.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *CSX Transp., Inc. v. Board of Public Works*, 138 F.3d 537, 540 (4th Cir. 1998). As the district court ruled, “this case fits comfortably under the *Ex parte Young* exception.” JA 233.⁷

⁷ Defendants contend (Br. 21) that the “defendants named in this litigation are not ‘bad actors’ like the defendant in *Young*.” But that would not distinguish this case from the dozens of other suits brought against state officials charged with enforcing unconstitutional state statutes, including waste statutes alleged to violate the

Defendants nevertheless claim that plaintiffs are not entitled to injunctive or declaratory relief, asserting (Br. 20) that Justice Kennedy’s opinion in *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997) — which was joined only by Chief Justice Rehnquist — casts doubt on the continuing validity of *Ex parte Young*. But, as the district court observed (JA 233), the Supreme Court “has repeatedly indicated that the doctrine remains sound.” *See, e.g., Alden v. Maine*, 119 S. Ct. 2240, 2263 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996); *Coeur d’Alene Tribe*, 521 U.S. at 262.

II. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE.

A. Plaintiffs Have Suffered Legal Injury.

Defendants argue that plaintiffs cannot be aggrieved by the challenged legislation because (1) the regional landfills were not statutorily authorized to accept imported waste, and (2) even if the landfills were authorized to accept out-of-state waste, the Commonwealth can restrict that right without violating the Commerce Clause. Neither claim has merit.

1. Virginia law expressly authorizes “[a]ny locality * * * to contract with any person, whether profit or nonprofit, for * * * disposal services in its locality.” Va.

Commerce Clause. *See, e.g., Environmental Tech. Council (“ETC”) v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996); *Chambers Med. Techs. v. Bryant*, 52 F.3d 1252 (4th Cir. 1995).

Code Ann. § 15.2-932. This and related provisions have twice been construed by the Virginia Supreme Court to authorize the counties to enter into host agreements with regional landfills. *Concerned Residents v. Board of Supervisors*, 449 S.E.2d 787, 794 (Va. 1994); *Concerned Taxpayers v. County of Brunswick*, 455 S.E.2d 712, 718 (Va. 1995). Nevertheless, defendants argue that these statutes do not authorize the disposal of *out-of-state* waste at regional landfills. Br. 23-24.

This argument is fundamentally flawed. First, contrary to defendants' contention (Br. 25), the "counties" do not "accept" interstate or any other waste at the regional landfills. As defendants admitted in their answers (JA 88, 165), the regional landfills were constructed and are operated with *private* funds by *private* parties, which hold permits issued by DEQ. Although the landfill operators entered into mutually beneficial host agreements with the counties, their rights to operate the landfills — including the right to accept out-of-state waste — and their standing to assert constitutional claims in this case do not depend on the scope of the legislature's delegation of authority to the counties to contract for waste disposal.

Second, the statutes that authorize the counties to enter into host agreements with regional landfills would themselves violate the Commerce Clause if they were read to preclude the disposal of out-of-state waste at landfills for which host agreements are in place. Defendants — who did not suggest before this case that state

law *already* barred the regional landfills from accepting out-of-state waste, even when the General Assembly was considering imposing a cap on those landfills — cannot save the statutes at issue here by advancing an unconstitutional construction of another statute.

2. Citing the “market participant doctrine,” defendants next claim that, “where a state enters the waste disposal market by operating municipal landfills, it may treat interstate waste differently than in-state waste at those landfills.” Br. 27. Thus, they say, plaintiffs lack standing because they have “asserted rights only with regard to the regional landfills,” as opposed to “private landfills.” Br. 28.

Under the market participant doctrine, “a state acting in its *proprietary capacity as a purchaser or seller* may favor its own citizens over others.” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 592-593 (1997) (emphasis added; internal quotation marks omitted). The doctrine applies when “the government * * * participat[es] directly in some aspect of the market as a purchaser, seller, or producer, and the alleged discriminatory effects on the interstate market flow[] from these market actions.” *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 716 (3d Cir. 1995). See *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Co.*, 426 U.S. 794 (1976);

Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311, 1318 (4th Cir. 1994). If there is no “*direct state involvement in the market*,” however, the strictures of the Commerce Clause apply with full force. *Camps Newfound/Owatonna*, 520 U.S. at 593 (emphasis added).

The district court correctly held that the market participant doctrine is inapplicable here because Virginia is acting as a regulator, not “a private participant in the waste disposal market” (JA 235-236), with respect to the regional landfills. The evidence shows that the regional landfills are not owned or operated by the Commonwealth or its instrumentalities, but are operated for profit by private companies. The market participant doctrine does not apply. *See Huish Detergents, Inc. v. Warren County*, 2000 WL 690173, *8, *10 (6th Cir. May 31, 2000).

B. Plaintiffs Were Not Obligated To Seek An Increase In Their Tonnage Allotments Before Challenging The Cap.

Defendants argue that plaintiffs lack standing to challenge the cap because they did not apply for an increase in the tonnage allotment under the statute’s variance provision. Given the overwhelming evidence that the cap was animated by a specific intent to limit increases in the quantities of out-of-state waste received by the regional landfills, the suggestion that those landfills stood any chance of obtaining increases

in their daily tonnage allotments is disingenuous at best.⁸ Indeed, the General Assembly's animus against out-of-state waste was so well known that the only landfill that applied for an increase made clear in its application that it "do[es] not accept out-of-state waste." JA 1002.

At any rate, defendants' standing argument is meritless. If the cap goes into effect, the maximum daily tonnage that WMH and Brunswick may receive at their landfills would be dramatically reduced. JA 469, 499. Some landfills would have to reduce their intake *immediately*, because they currently receive more MSW per day than the cap would allow. JA 470, 499. All of them would be precluded from bidding on contracts while variance applications are pending. The prospect of such harm plainly confers standing on plaintiffs. *See Bob's Home Serv., Inc. v. Warren County*, 755 F.2d 625, 627 (8th Cir. 1985) (cap prohibiting expansion of a waste disposal facility "until granted a permit by the state" presented justiciable controversy because it denied plaintiffs the "right to expand their operations in the future" and "implie[d] an immediate injury, a reduction in the value of plaintiffs' land and business"). The possibility of future relief does not negate standing conferred by a present injury.

⁸ Defendants claim (Br. 29) that we "conceded" that the landfills probably would receive waivers if they applied for them. That contention misrepresents the deposition testimony of Lee Wilson. When asked whether he believed that the Charles City County landfill would be granted an increased tonnage allotment, Wilson answered: "From a regulatory standpoint, yes, from a political standpoint, no." JA 1371.

Furthermore, a challenge to a discriminatory statute may be heard despite the plaintiffs' failure to satisfy an "additional hurdle" of obtaining an administrative approval, if the hurdle itself "was interposed with discriminatory purpose and/or with disparate impact," because the "hurdle itself is illegal whether or not it might have been surmounted." *Jackson v. Okaloosa County*, 21 F.3d 1531, 1541 (11th Cir. 1994). *See also Chambers*, 52 F.3d at 1265 (plaintiff had standing to challenge state statute that imposed immediate compliance costs); *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725, 731-732 (M.D. Ga. 1992) (permit requirement for out-of-state waste disposal is burdensome and has a discriminatory effect); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 968 (1984) ("The possibility of a waiver may decrease the number of impermissible applications of the statute, but it does nothing to remedy the statute's fundamental defect.").

In sum, the cap provision would have an immediate, concrete and substantial impact on the operation of WMH's and Brunswick's landfills and would force them to incur the expense and delay of a (likely unsuccessful) variance proceeding from which their local counterparts are effectively exempt. Plaintiffs plainly have standing to challenge the cap.

C. The Statutory "Savings Clauses" Do Not Render This Lawsuit Premature.

Defendants contend (Br. 31) that plaintiffs may not bring a pre-enforcement

challenge to the barging and trucking restrictions because those provisions contain so-called “savings clauses” providing that they may be enforced only to the extent allowable under federal law. That argument is frivolous. *No* state legislation may be enforced if it is inconsistent with the Constitution or federal statutes; a state may not immunize its laws from attack by making that restriction explicit.

1. The three-river ban provides that the shipment of waste “is prohibited on the Rappahannock, James and York Rivers, *to the fullest extent consistent with limitations imposed by the Constitution of the United States.*” Va. Code Ann. § 10.1-1454.2 (emphasis added). Virginia’s effort to close channels of commerce to out-of-state waste patently violates both the Commerce Clause and the Supremacy Clause. As the district court aptly observed, because “the Constitution does not permit the challenged legislation *at all*,” it cannot be “‘saved’ by a ‘savings clause.’” JA 136 (emphasis in original).

Because the statutory prohibition is flatly unlawful, no purpose would be served by forcing the plaintiffs either to refrain from using Virginia’s navigable waterways or risk an enforcement action by attempting to guess what DEQ has in mind. Defendants argue that DEQ was entitled to a presumption that it would give the statute “a reasonable and constitutional interpretation” (Br. 34), but neither DEQ nor defendants have advanced such an interpretation. Given the Hobson’s choice

presented to plaintiffs, the court did not overstep “judicial restraint” by deciding the issue of the three-river ban’s constitutionality.

2. Defendants also contend that plaintiffs’ challenges to the container-stacking provision and the trucking provisions are premature because those also include “savings clauses.” Defendants did not raise those arguments below, and therefore waived them. *See Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993). In any event, these arguments fail on the merits.

Section 10.1-1454.1 requires DEQ to enact regulations that “include * * * requirements, to the extent allowable under federal law, that * * * (d) containers be stacked no more than two high on barges.” Like the three-river ban, the container-stacking limitation is clear and specific — and it clearly violates both the Commerce Clause and the Supremacy Clause. DEQ has neither expressed any reservation about possible conflicts with federal law, nor suggested that it will adopt anything but a literal reading of the provision. The “savings clause” thus cannot prevent a determination that the law as written is unconstitutional.

The same is true of the trucking provisions. Section 10.1-1454.3 directs the Board to “develop regulations governing the commercial transport of nonhazardous municipal solid waste * * * by truck.” “Truck” is defined as “any tractor truck semitrailer combination having four or more axles.” The regulations must, “to the

extent allowable under federal law and regulation,” include provisions that, among other things, impose financial responsibility requirements on truck owners and require trucks to be designed, constructed, and maintained to prevent the escape or spillage of waste.

Plaintiffs are challenging the trucking provisions because, by limiting the restrictions to tractor-trailers having four or more axles, the General Assembly assured that they will burden virtually all imported waste while exempting most in-state waste. The “savings clause” applies only to the *content* of the restrictions, not to the discriminatory definition that determines their *applicability*. The requirement that the regulations not conflict with federal law therefore presents no bar to consideration of plaintiffs’ claims.

III. CONGRESS DID NOT AUTHORIZE STATES TO DISCRIMINATE AGAINST OUT-OF-STATE WASTE.

Defendants argue (Br. 36-40) that, in enacting Subtitle D of RCRA, Congress authorized the states to discriminate against out-of-state waste. Defendants’ argument implies that dozens of cases, including several decided by the Supreme Court, would have come out differently if only the defendants in those cases had raised the authorization argument. In fact, the argument has been raised before, and has been consistently rejected. *See C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 407-410 (1994) (O’Connor, J., concurring); *Harvey & Harvey, Inc. v. County of*

Chester, 68 F.3d 788, 796 n.8 (3d Cir. 1995); *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1384 n.7, 1389 (8th Cir. 1993); *In re Southeast Ark. Landfill, Inc.*, 981 F.2d 372, 377 (8th Cir. 1992); *Container Corp. v. Mecklenburg County*, 1995 WL 360185, at *7 (W.D.N.C. June 22, 1992); *Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth.*, 877 F. Supp. 935, 948 (M.D. Pa. 1994). *See also ETC*, 98 F.3d at 782-783 (rejecting similar argument in hazardous waste context). The district court properly rejected the argument here.

Congressional authorization to discriminate against interstate commerce is rarely granted and must be “unmistakably clear.” *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). The fragments of statutory language and legislative history cited by defendants fall far short of that demanding standard. Particularly infirm is defendants’ effort (Br. 38) to string together snippets from the 1976 House Report to create the impression that Congress was aware of discriminatory state restrictions and decided to sanction them. In fact, the Report makes clear that Congress regarded discriminatory state restrictions as one of the “problems” affecting solid waste management. H.R. REP. NO. 94-1491, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6247.

RCRA Section 4007(c) (42 U.S.C. § 6947(c)), upon which defendants rely, merely disclaims Congressional intent to preempt already lawful state activities. It

cannot reasonably be construed as “unmistakably clear” authorization to do what was hitherto unlawful — particularly when the legislative history shows that Congress considered waste embargoes to be a “problem.”

Justice O’Connor did not err when she rejected an argument identical to defendants’ in *C&A Carbone*. First, she did not mistakenly deem legislative history irrelevant to the issue; instead, she reviewed relevant excerpts and concluded that they “neither individually nor cumulatively rise to the level of the ‘explicit’ authorization required by our dormant Commerce Clause decisions.” 511 U.S. at 409. Second, her supposed failure to discuss 42 U.S.C. § 6947(c) does not undermine her conclusion; as noted above, that section cannot reasonably be read to abrogate restrictions imposed by the Commerce Clause.

IV. THE CHALLENGED PROVISIONS VIOLATE THE COMMERCE CLAUSE.

The Commerce Clause provides that “[t]he Congress shall have Power * * * [t]o regulate Commerce * * * among the several States.” U.S. Const. art. I, § 8, cl. 1, 3. The Clause reflects the view of the Framers “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.” *Oregon Waste Sys., Inc. v. Department of Env’tl. Quality*, 511 U.S. 93 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)). To achieve

this goal, the Commerce Clause prevents states from erecting barriers against each others' products and trade. Accordingly, "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. City of Baltimore*, 100 U.S. (10 Otto) 434, 439 (1879).

It is beyond dispute that "[s]olid waste * * * is an article of commerce" and that "[t]he Commerce Clause thus imposes some constraints on [a state's] ability to regulate" commercial transactions involving MSW. *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992). The Supreme Court, this Court, and other federal courts repeatedly have struck down state and municipal efforts to restrict or ban the importation of out-of-state waste as violating the Commerce Clause.⁹ The district court correctly ruled that the legislation challenged here deserves the same fate.

⁹ See, e.g., *Carbone, supra*; *Oregon Waste Sys., supra*; *Fort Gratiot, supra*; *Chemical Waste Management, Inc. ("CWM") v. Hunt*, 504 U.S. 334 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *ETC*, 98 F.3d at 787; *National Solid Wastes Management Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995); *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1268 (7th Cir. 1992); *In re Southeast Ark. Landfill, Inc.*, 981 F.2d 372 (8th Cir. 1992); *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713 (11th Cir. 1990), as modified upon denial of reh'g, 924 F.2d 1001 (11th Cir. 1991).

A. The Challenged Provisions Are Subject To Strict Scrutiny.

As this Court has observed, the Supreme Court has established “‘a virtually per se rule of invalidity,’ [that] applies where a state law discriminates [against out-of-state economic interests] facially, in its practical effect, or in its purpose.” *ETC*, 98 F.3d at 785 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454-455 (1992)). The district court correctly concluded that each of the challenged provisions demands this level of judicial review.

1. The challenged provisions have a discriminatory purpose.

Defendants concede (Br. 41) that state laws motivated by an intent to discriminate against interstate commerce are subject to strict scrutiny. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981); *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 352 (1977); *ETC*, 98 F.3d at 785; *Chambers*, 52 F.3d at 1259-1260. As the district court correctly found, the challenged provisions were motivated by the express intent to thwart the importation of MSW.¹⁰

¹⁰ Defendants contend that the district court erroneously concluded that the provisions discriminate on their face. Br. 42-43. But it is apparent that the district court simply misspoke in stating that the statutes discriminate “facially.” JA 1411. Earlier in the case, it expressly recognized that “the challenged statutes do not discriminate against interstate waste on their face.” JA 134. Moreover, as the rest of the summary judgment opinion makes clear, the court found that the provisions were enacted with discriminatory intent. *See, e.g.,* JA 1414 (“the record demonstrates that Virginia acted to staunch the importation of MSW in a knee-jerk response to reports

This Court has recognized “several factors * * * as probative of whether a decisionmaking body was motivated by a discriminatory intent, including the specific sequence of events leading up to the particular decision being challenged” and “contemporary statements by decisionmakers.” *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 819 (4th Cir. 1995); *see also Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267-268 (1977) (in determining whether legislation was motivated by discrimination, court should consider “[t]he specific sequence of events leading up to the challenged decision” as well as “contemporary statements by members of the decisionmaking body”). As explained above, the “sequence of events” leading up to the passage of the challenged legislation included:

- reports that Virginia had become the nation’s second largest importer of MSW (JA 582);
- news that New York City was planning to close the Fresh Kills landfill and begin exporting more of its MSW (JA 601, 633-634);
- reports that WMH had made a significant investment in the James River facility and was planning to begin barging MSW to Virginia (JA 606); and
- recognition by legislators that the seven regional landfills had the capacity to increase their daily waste intake substantially unless

that increased levels of out-of-state MSW would soon be flowing into the Commonwealth”); *id.* (“Virginia did not intend ‘to drown in a sea of regional garbage,’ and it had no ‘intention of becoming New York’s dumping grounds.’”).

they were capped at present levels (JA 607, 667).

In contemporaneous statements to the public and to the General Assembly, Governor Gilmore (who aggressively promoted the legislation and whose signature was necessary for its enactment) and Senator Bolling (who sponsored the bills and shepherded them through the General Assembly) *expressly cited* these facts as demonstrating the need for the legislation. JA 637-638, 644-650. If that were not enough, both repeatedly and publicly expressed their desire to limit the amount of out-of-state MSW entering Virginia. JA 365, 546.

The statements of Governor Gilmore and Senator Bolling are sufficient to prove legislative intent to discriminate against out-of-state waste. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (“remarks * * * of the sponsor of the language ultimately enacted are an authoritative guide to [a] statute’s construction”); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 423-424 (1996) (governor’s signing statement probative of legislative intent); *SSDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995) (finding referendum to have discriminatory motivation based on “con” statement in state-sponsored voter pamphlet that “exhorted voters to vote against the ‘out-of-state dump’ because ‘South Dakota is not the nation’s dumping grounds’”); *National Solid Waste Management Ass’n v. Williams*, 877 F. Supp. 1367, 1378 n.11 (D. Minn. 1995) (considering statements in committee by sponsor evincing

discriminatory intent). But there is ample evidence that other legislators shared their discriminatory views.

For example, the proposed legislation's discriminatory purpose was forthrightly explained to members of the General Assembly considering the bill. JA 637-643. Indeed, General Assembly members were assured that the cap legislation had been modified to burden only the regional landfills. JA 673, 667-672. While the General Assembly considered the legislation, Campaign Virginia and the Sierra Club conducted an aggressive lobbying campaign urging legislators to curtail waste imports. JA 1351-1358. Speeches on the floor of the General Assembly — such as Delegate Williams's — made it clear that those voting for the legislation intended that result. JA 1007.

In the face of this clear evidence, defendants first seek to establish an insurmountable standard for proving discriminatory intent, claiming that plaintiffs were required to prove that “a *majority* of the Virginia General Assembly enacted this legislation for the sole purpose of burdening out-of-state commerce.” Br. 44 (emphasis added). The principal case cited by defendants fails to support that argument. In *Scott-Harris v. City of Fall River*, 134 F.3d 427, 438 (1st Cir. 1997), *rev'd*, 523 U.S. 44 (1998), the court found that evidence of racial animus on the part of two members of a nine-member City Council — unknown to the other seven —

was insufficient to support a claim for damages based on adoption of a city ordinance. The court expressly acknowledged, however, that circumstantial evidence — such as “evidence indicating that the legislators bowed to an impermissible community animus, * * * manifested by an unusual level of constituent pressure”— could support an inference of an impermissible motive. 134 F.3d at 438. If anything, the decision in *Scott-Harris* bolsters our position.

The other case cited by defendants, *Eastern Kentucky Resources v. Fiscal Court of Magoffin County*, 127 F.3d 532 (6th Cir. 1997), also fails to support their contention. The sole evidence of discriminatory intent in that case was a study that discussed “how to slow down or prevent the entry of out-of-state garbage into the Commonwealth.” *Id.* at 542. Plaintiff “did not present any evidence to show that the study impacted the legislature, how the study impacted the legislature, or how the study led to the passage of — or even influenced — the challenged provisions.” *Id.* at 543. Here there is ample evidence that discriminatory motives prompted the legislation and determined its content.

Defendants next contend (Br. 44) that “the vast majority” of the evidence we used to prove discriminatory intent was inadmissible; *see also* Br. 10 (contending that the district court relied “on a series of inadmissible newspaper articles and press releases”). That assertion is false. The vast bulk of the evidence of discriminatory

intent that was before the district court (and everything we cite in this brief) — which included publicly-released documents from Governor Gilmore, Senator Bolling, and DEQ (JA 503-526, 557-597, 601-610, 623-650, 657-660, 666-671, 678-699); transcripts of videotaped legislative proceedings (JA 665, 672-673, 1007); and publicly reported remarks of the Governor and others (JA 40, 44, 96), the accuracy of which defendants admitted (JA 152, 153, 173) — would have been admissible at trial. Defendants — who neither explain why these official statements would be inadmissible nor deny that they were in fact made — did not object to the district court’s consideration of this evidence, and they cannot raise such objections for the first time on appeal. *See* 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *FEDERAL PRACTICE & PROCEDURE* § 2722, at 384-385 (3d ed. 1998). To entertain such objections now would “allow a party to sandbag the district court * * * selectively opposing the points it chose, and on appeal claiming that the unopposed points were defectively presented.” *Williamson v. United States Dep’t of Agric.*, 815 F.2d 368, 382 (5th Cir. 1987) (internal citations and quotation marks omitted).¹¹

Defendants next contend that Senator Bolling’s declaration — prepared for use

¹¹ In the trial court, defendants contested the admissibility only of certain statements by non-parties that were reported in news articles. *See* Commonwealth’s Response to Plaintiffs’ Motion for Summary Judgment, Doc. # 71 at 13 n.4. But those statements were merely the “icing on the cake,” and were not necessary for plaintiffs to prove discrimination — as the district court implicitly ruled.

in this litigation after the challenged provisions were enacted — refutes the evidence of discriminatory intent. Br. 46. But as this Court has held, “statements of legislative intent made subsequent to enactment are not nearly as authoritative as statements contemporaneous to enactment.” *Director, Office of Worker’s Compensation Programs v. Bethlehem Mines Corp.*, 669 F.2d 187, 196 (4th Cir. 1982); *see also Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980) (“The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history”). Thus, Senator Bolling’s current claims about his intentions do not override the contemporaneous evidence of the purposes he communicated to his colleagues and the public — for example, that a cap on landfills was “the only effective way of limiting the amount of waste that is being imported to Virginia, and preserving our current landfill capacity for future generations of Virginians.” JA 607. In any event, Senator Bolling’s declaration *admits* that the legislation was principally motivated by a concern about out-of-state waste. JA 1228-1229. His assertion that his efforts to limit out-of-state waste were rooted in genuine concerns about health and safety do not rescue the legislation from strict scrutiny. *See Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986) (the “virtually per se rule of invalidity” applies “to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade”).

2. The challenged provisions are discriminatory in practical effect.

As explained above, the legislation was carefully crafted to impose new burdens on the transportation and disposal of out-of-state MSW while minimizing impacts on Virginia-generated MSW. In practical effect, the legislation (1) imposes daily limits only on those landfills that accept large quantities of out-of-state MSW, (2) eliminates a cost-effective pathway for importing MSW — namely, barging, and (3) places burdens on the transportation of out-of-state MSW by truck that do not apply to the vast majority of the Virginia waste that is transported by truck. Because “[t]he commerce clause forbids discrimination, whether forthright or ingenious” (*Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940)), the legislation must be subjected to strict scrutiny. *See also ETC*, 98 F.3d at 787 (court must determine whether statute will “in its practical operation work discrimination against interstate commerce”) (internal citation and quotation marks omitted)).

Defendants argue (Br. 48) that a state law cannot violate the Commerce Clause unless it *benefits* in-state economic interests at the expense of out-of-state interests. But the Commerce Clause is implicated whenever a State “erect[s] a barrier against the movement of interstate trade.” *City of Philadelphia*, 437 U.S. at 628; *see also Carbone*, 511 U.S. at 389 (“It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow.”);

CWM, 504 U.S. at 339-340 (“No State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade.”). Moreover, the Supreme Court repeatedly has found state legislation to violate the Commerce Clause even when in-state interests are harmed by the challenged law. *See, e.g., Camps Newfound/Owatonna, supra* (invalidating state law denying tax benefit to in-state camp engaged in interstate commerce); *Carbone*, 511 U.S. at 391 (ordinance “is no less discriminatory because in-state or in-town processors are also covered by the prohibition”); *Fort Gratiot*, 504 U.S. 353 (striking down law prohibiting in-state landfills from accepting out-of-state waste). In any event, a law need not be designed to further local economic interests to run afoul of the Commerce Clause. Where discrimination is patent, as it is here, “neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown.” *New Energy Co. v. Limbach*, 486 U.S. 269, 276 (1988).

Defendants also dispute that the challenged provisions disproportionately burden out-of-state waste. As we now discuss, there is no material issue about the facts establishing the discriminatory effect of Virginia’s legislation.

a. The cap

As explained above, the cap was gerrymandered to “freeze” volumes at the regional landfills, which receive 97% of the MSW transported into Virginia, while

leaving unaffected virtually all of Virginia's 63 other MSW landfills. This provision, therefore, is far from "[a]n evenhanded cap or limit [that] uniformly burdens both in-state and out-of-state interests." *ETC*, 98 F.3d at 787 (invalidating statewide annual cap on in-state disposal of hazardous waste because the statute created discriminatory exceptions for in-state interests). Instead, it is similar to the South Carolina statute at issue in *Chambers*, which capped the amount of infectious waste that could be incinerated in the State, but effectively exempted from the cap facilities incinerating in-state waste. *Chambers*, 52 F.3d at 1260 n.11. Because the cap is thus "'an obvious [legislative] effort to saddle those outside the State' with most of the burden of slowing the flow of waste into the [in-state] facility" (*CWM*, 504 U.S. at 346) (quoting *City of Philadelphia*, 437 U.S. at 628), it is subject to strict scrutiny.

Defendants contend that we have not established the discriminatory effect of the cap because we relied "solely" on "an unsubstantiated assertion by Lee Wilson * * * that none of the landfills receiving primarily Virginia MSW receive close to 2,000 tons per day of waste." Br. 49. In fact, not only did Mr. Wilson have ample basis for his statement, but documents and information provided by DEQ to Senator Bolling, which he in turn provided to other members of the General Assembly as they considered the legislation, plainly demonstrated that the impact of the 2,000 ton per day cap would fall solely on the regional landfills. *See* pages 13-14, *supra*. Indeed,

the cap was engineered with precisely that discriminatory impact in mind.

Defendants also claim (Br. 50) that the regional landfills could allocate most of their capacity to out-of-state waste. But even if contractual obligations could be ignored and the regional landfills could allocate their full, capped capacity to out-of-state waste, total waste imports would still be far lower than they would be if the regional landfills operated at their permitted design levels. JA 667-668.

Defendants contend in addition that SPSA, which accepts only Virginia waste, “operates near the cap already and expects to reach that level soon.” Br. 49. But DEQ reported to the General Assembly that SPSA accepted waste at the rate of only 1,540 tons per day. JA 666. When SPSA applied for an increase in its tonnage allotment, moreover, it made clear that it expected to exceed the cap only on the “rare” occasions when its waste-to-energy plant is shut down for repairs. JA 1007.

b. The restrictions on barging

The restrictions on barging are also plainly discriminatory. As discussed above, they would block an efficient mode of importing MSW and foil WMH’s announced plans to use barges, while affecting the transportation of Virginia waste negligibly, if at all. *See* pages 15-16, *supra*. Thus, these provisions are similar to other state statutes, invalidated by the courts, that appeared facially neutral but had the effect of increasing disproportionately the costs of interstate commerce. *See, e.g., Washington*

State Apple Advertising Comm'n, 432 U.S. at 337 (North Carolina statute requiring apples to be identified solely by federal grade increased cost to Washington apple growers of doing business in the state and therefore had an “obvious” discriminatory effect); *Government Suppliers*, 975 F.2d at 1275 (restrictions on municipal waste trucks that disproportionately affected transportation of out-of-state waste impermissibly created an “economic barrier against importation of municipal waste”). Indeed, the three-river ban and the pre-regulation ban “overtly block[] the flow of interstate commerce at a State’s borders,” which is “[t]he clearest example” of economic protectionism warranting strict scrutiny. *See City of Philadelphia*, 437 U.S. at 624. And the container-stacking limitation, which would make barging MSW into Virginia economically prohibitive, is analogous to the state limitations on train length and truck length that have been struck down as “serious impediment[s] to the free flow of commerce.” *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945); *see also, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

Defendants contend incorrectly that summary judgment was inappropriate because “[p]laintiffs failed to present any evidence that there is not, never has been, and never would be any interest in barging Virginia MSW.” Br. 50. *Defendants* had the burden of producing evidence to rebut plaintiffs’ evidence of discriminatory effect, and did not do so. Defendants refer to “other instances of MSW barging in the

Commonwealth” (*id.*), but the cited affidavit of a DEQ official (JA 743) states only that “in state actors” might be interested in barging waste; it notably fails to assert that the barging of *in-state waste* has been or is likely to be affected by the legislation.

c. The truck provisions

As discussed above (at pages 16-19), both of the truck provisions indisputably discriminate in their practical effect. The certification provision applies only to the transport of MSW in trucks having four or more axles. It is undisputed that virtually all out-of-state MSW shipped by truck is subject to the provision, while a substantial portion of Virginia’s MSW, which is carried in trucks having fewer than four axles, is exempt. The regulations applicable to commercial tractor-trailers having four or more axles are even more discriminatory. Essentially all out-of-state waste transported over the roads in Virginia is carried on commercial tractor-trailers having more than four axles, while only about 18% of Virginia’s MSW is carried on such vehicles. Because they exempt a large portion of local waste from the burdens imposed on out-of-state waste, the truck provisions plainly are subject to strict scrutiny under the Commerce Clause. *See Chambers*, 52 F.3d at 1260 n.11 (exclusion of non-commercial facilities from cap on waste disposal may render the cap discriminatory in practical effect); *Valero Terrestrial Corp. v. McCoy*, 36 F. Supp.2d 724, 759-760 (1997) (statute capping amount of sludge that could be composted

discriminated in practical effect by exempting facilities where waste was generated, thereby excluding from regulation all sludge generated in-state), *vacated in part as moot*, 50 F. Supp.2d 564 (N.D. W.Va. 1999), *aff'd in part, vacated in part*, 211 F.2d 211 (4th Cir. 2000).

Defendants do not dispute that virtually all out-of-state waste is affected by the certification provision, while a large proportion of Virginia waste is exempt. They merely question Robert Guidry's assessment of the magnitude of that exemption, specifically by disparaging his basis for estimating the amount of waste carried on vehicles with a fourth "tag" axle, and adding that DEQ subjects pickup trucks towing trailers to the certification requirement. Br. 51-52. As to the former, defendants make no effort to dispute the reasonableness of the assumption that other operators use approximately the same proportion of tag axle vehicles as WMH. As to the latter, DEQ's odd interpretation of the statute to apply to pickup trucks towing trailers clearly contradicts the legislative intent to reach only long-haul vehicles. *See, e.g.*, JA 602 (statement of Senator Bolling that "much of the waste currently being imported to Virginia comes from long haul transport operations"); House Committee on Conservation and Natural Resources (2/3/99), Tape 4, at 4:03 ("you don't want to necessarily have statewide regulations for the trash truck that goes through the suburban neighborhood picking up people's garbage — but you wanted to put

regulations on trucks that basically deal with transportation on the highways, which we decided was four or more axles”). In any event, defendants offered no evidence that the transportation of waste to local landfills in such small capacity vehicles adds a significant amount to the total percentage of in-state waste affected by the certification provision.

Defendants insist (Br. 52) that the certification provision is not burdensome. But the magnitude of the burden imposed does not affect the threshold question of whether a provision of state law is discriminatory and therefore subject to strict scrutiny. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. at 455; *Bacchus Imports*, 468 U.S. at 269. Moreover, the fact that the General Assembly crafted the statute so as to exempt most local waste from the requirement belies defendants’ assertion that it imposes no substantial burden. *See* JA 1068 (testimony of SPSA Director that SPSA requested that vehicles with less than four axles be exempt from the certification provision because of “the sheer volume of additional work that [otherwise] would have been required”).

The discriminatory impact of the tractor-trailer regulations is even clearer. Defendants do not dispute that virtually 100% of out-of-state waste is shipped on tractor trailers having four or more axles, while only 24% of in-state waste is carried on such vehicles. They take issue only with our contention that the statutory

limitation to “commercial transport” exempts *another* 6% of Virginia’s waste — that carried on SPSA’s tractor-trailers. Br. 53. Even if one accepts defendants’ made-for-litigation reading of “commercial transport” to include transportation of MSW by a public sanitation agency, that would still leave an undisputed 76% of Virginia’s waste *exempt* from restrictions that affect virtually all truck-transported out-of-state waste — a disparity of treatment that plainly suffices to require strict scrutiny. *See, e.g., Associated Indus. v. Lohman*, 511 U.S. 641, 650 (1994); *Limbach*, 486 U.S. at 276.

B. The Challenged Provisions Cannot Survive Strict Scrutiny.

A statute that discriminates against out-of-state economic interests will survive strict scrutiny only if the state proves that the law “is demonstrably justified by a valid factor unrelated to economic protectionism * * * and that there are no nondiscriminatory alternatives adequate to preserve the local interests at stake.” *ETC*, 98 F.3d at 785 (citations and internal quotation marks omitted). The challenged provisions fail both prongs of this strict test.

1. The justification advanced by defendants is a sham.

Defendants argue that Virginia was entitled to enact legislation discriminating against out-of-state MSW because “solid waste streams generated in trash exporting states raise health and safety concerns not presented by Virginia waste.” Br. 56. They

principally contend that Virginia’s regulations governing the permissible contents of MSW are more stringent in some ways than the regulations of certain other states; that the states have different regulations governing transfer stations; and that Virginia has less control over out-of-state generators than it has over in-state generators. Br. 12-13.¹² Citing *Maine v. Taylor*, *supra*, and *City of Philadelphia*, *supra*, defendants assert that states may discriminate against interstate commerce if they can demonstrate that it poses “potential health threats.” Br. 54. This argument is flatly inconsistent with defendants’ assertion that the cap is *not* discriminatory because it would not “prohibit any landfill in Virginia from allocating all or the majority of its capacity to interstate MSW to the exclusion of in-state MSW.” Br. 50. In any event, defendants’ proffered

¹² As we demonstrated in response to defendants’ motion for partial summary judgment, the justifications for discrimination advanced by defendants are insubstantial. Defendants contend, for example, that the State of Washington does not exclude infectious medical waste from its waste stream (Br. 12-13), but that West Coast state ships no MSW into Virginia. JA 1023. They assert that medical waste regulations of states that do export MSW into Virginia are “far more lenient” than Virginia’s (Br. 13), but the alleged distinctions are actually quite marginal. Defendants claim, for example, that North Carolina allows “liquid blood” in the waste stream (*id.*), but in fact North Carolina exempts blood from regulation as medical waste only if it is enclosed in an individual container of less than a teaspoon and is segregated and stored in a secure area before offsite disposal. N.C. Admin. Code tit. 15A, r. 13B.1202. The regulations of Maryland, the District of Columbia, New York State and New York City are at least as stringent in their regulation of items contaminated by blood as Virginia’s regulations — which allow materials contaminated with “small amounts” of blood to be mixed into the solid waste stream. 9 VAC 20-120-130.D.2. There was undisputed evidence, moreover, that medical waste and other unauthorized material frequently has been found in waste shipments from in-state sources. JA 946-941.

justifications for discriminating against out-of-state waste do not justify the restrictions at issue here.

First, defendants' reliance on *Maine v. Taylor* is utterly misplaced. There, a complete ban on importation of live baitfish was found to be the only means of protecting Maine's "unique and unusually fragile" fisheries from parasites and exotic species. *See* 477 U.S. at 151. By contrast, defendants at best identify only marginal differences in the way states define MSW. Br. 12-15. If that were a sufficient ground for discrimination, then every state could exclude its neighbors' waste. Yet, to date, neither the Supreme Court nor the Fourth Circuit has *ever* relied upon the analysis of *Maine v. Taylor* to uphold regulations limiting the importation of out-of-state waste. *See Carbone*, 511 U.S. at 422 n.11 (citing *Maine v. Taylor* as "the rare occasion when discriminatory laws are the best vehicle for furthering a legitimate state interest") (Souter, J., dissenting); *Fort Gratiot*, 504 U.S. at 367 (distinguishing *Maine*); *CWM*, 504 U.S. at 348 (same); *ETC*, 98 F.3d at 785 (same); *Chambers*, 52 F.3d at 1264 (same); *Medigen of Ky., Inc. v. Public Serv. Comm'n*, 985 F.2d 164, 166 (4th Cir. 1993) (same). Indeed, to permit the states to adopt regulations "not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co. v. City of Madison*, 340 U.S.

349, 356 (1951).

Second, as the district court found, it is evident that the “legitimate justifications the State has put forward for its statute are merely a sham or a ‘post hoc rationalization.’” *Maine*, 477 U.S. at 149 (quoting *Hughes*, 441 U.S. at 338 n.20). The ample legislative history contains no suggestion that the General Assembly’s hostility toward out-of-state waste, particularly that from New York, was grounded in any qualitative distinction between Virginia’s and other states’ definitions of acceptable MSW.

To the contrary, legislators expressed concern that imported waste would prematurely exhaust Virginia’s landfill capacity, impose burdens on Virginia that should be borne by other states, and ruin Virginia’s image (*see* pages 5-12, *supra*) — all of which are improper motivations under the Commerce Clause. *See, e.g., City of Philadelphia*, 437 U.S. at 627 (“a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders”); *see also ETC*, 98 F.3d at 786 (“[t]he burden * * * of conserving the State’s remaining landfill space should not fall disproportionately on out-of-state interests”) (citation and internal quotation marks omitted). Because the proffered justification for Virginia’s discriminatory legislation is an after-the-fact invention of defendants’ counsel and their retained expert witnesses, and is not a legitimate state interest served

by the statute, the challenged provisions fail strict scrutiny. *See Hutchins v. District of Columbia*, 188 F.3d 531, 567 (D.C. Cir. 1999).

This case is quite unlike *National Solid Wastes Management Ass'n v. Voinovich*, 959 F.2d 590 (6th Cir. 1992), upon which defendants heavily rely. Br. 57-58. There, the trial court erroneously declared the State's justifications for the challenged legislation "irrelevant" because the statutes discriminated "on their face"—thus denying the State the opportunity to demonstrate that the statutes survived strict scrutiny. 959 F.2d at 593. Here, in contrast, the district court ruled that the statute *failed* both prongs of strict scrutiny review.¹³

2. Even if the Commonwealth's purported health and safety justifications were genuine, they would not survive strict scrutiny.

"[E]ven in the exercise of its unquestioned power to protect the health and safety of its people," a state may not adopt measures that discriminate against out-of-state commerce "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Dean Milk*, 340 U.S. at 354. The district court correctly found that defendants failed to prove that the challenged provisions

¹³ Defendants contend that a law may survive strict scrutiny "even though it may have been the result of inappropriate motives," as long as there *could have been* a proper motive for enacting the law. Br. 59. That standard, which applies to due process and equal protection challenges to economic legislation, is simply inapplicable in the Commerce Clause area.

were the least discriminatory means of serving the interests advanced.

a. The cap

Defendants argue that “the practical impossibility of inspecting all waste loads coming into the Commonwealth” makes the cap on the daily disposal rate a “necessary and appropriate mechanism” for protecting against “uncontrolled growth in the rate of waste disposed of in Virginia.” Br. 61. In their statement of facts, they contend more specifically that imposing a 2,000-ton-per-day cap will (1) “decrease[] the chances that items of improper and potentially dangerous waste will be contained in waste loads transported within Virginia”; (2) “improve DEQ’s ability to police waste for compliance with Virginia law”; and (3) “allow the industry to better police itself.” Br. 8. They also suggest (Br. 6) that the General Assembly was motivated to “exercise control over waste volumes” because of its concern over risks posed by accidents involving trucks carrying MSW. These contentions do not establish that the cap is the least discriminatory means of addressing the Commonwealth’s concerns.

The first purported justification is patently nonsensical; the cap simply does not address the composition of waste coming into the landfill, much less target the special risks supposedly associated with out-of-state waste. For example, although defendants contend that the regulations of importing states vary, the legislation makes no effort to distinguish among states according to those differences; each landfill

receiving substantial amounts of out-of-state MSW is burdened by the cap, without regard to whether some, most or all of the MSW received by that landfill comes from states with regulations identical to or more stringent than Virginia's. In fact, nothing in the cap provision would preclude plaintiffs from using their entire daily tonnage allotments for waste from states with the *least* restrictive regimes.

The second and third justifications also fail, because there are many less discriminatory means of improving DEQ inspection and industry self-policing. For example, DEQ could increase inspections of MSW arriving at landfills. *See Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 377 (1976) (“[i]n the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own, [a state] has the obvious alternative of applying its own standards of inspection” to imported goods). Indeed, DEQ has already requested and received funding to double its inspection force, and, as of the time the summary judgment motion was briefed, had not yet fully deployed those resources. JA 956, 959. If further resources are needed, Virginia could impose an evenhanded tax on all waste, regardless of its origin — an option that the General Assembly expressly rejected. JA 712-713.

Virginia could also tighten requirements for self-policing. For example, it could amend its regulations — which now require only periodic, random inspection

for hazardous waste (9 VAC 20-80-250.c) — to require landfill operators to have trained inspectors working at all times. The Commonwealth also could require certification by transporters that the MSW they carry contains no unauthorized material as defined by Virginia’s regulations. Virginia’s 1999 solid waste legislation contains such a requirement; defendants challenge that provision here only because it discriminates against out-of-state MSW by being limited to trucks having four or more axles. A properly designed, non-discriminatory certification requirement would help to ensure that *all* waste brought to disposal facilities in Virginia meets Virginia’s regulations, without disproportionately burdening out-of-state waste.

And if a cap of some sort were necessary to promote effective inspections or self-policing, there clearly are less discriminatory alternatives to the gerrymandered cap at issue here. For example, DEQ could be directed to determine for each landfill a cap that takes into account its topography, operating characteristics, and other factors bearing on its ability to be inspected effectively. Such an individualized determination would be far more even-handed than an arbitrary 2,000-ton-per day cap that limits the growth of the regional landfills, while allowing local landfills to grow without restriction regardless of their amenability to inspection or the quality of their self-policing. Indeed, if Virginia truly were concerned about the risks posed by the shipment of dangerous materials to its MSW landfills, it would have directed its

regulatory efforts toward the many local landfills that do not comply with Subtitle D and may be contaminating the groundwater, rather than to the regional landfills that meet or exceed these federal standards and are far more protective of the environment.

Finally, any concern about accidents involving waste trucks could have been addressed by alternatives less discriminatory, and more effective, than the blunt instrument of a cap aimed at decreasing the flow of MSW into Virginia. For example, the General Assembly could have required that any MSW spill be cleaned up to exacting standards and with precautions appropriate to possibly hazardous materials. That would have increased public safety far more effectively than the General Assembly's "knee-jerk" effort to limit waste imports — and the associated truck traffic — through a cap, while at the same time diverting more MSW to the roadways by banning the transportation of MSW by barge.

Like the provision struck down in *Hughes v. Oklahoma*, the cap is "certainly not a 'last ditch' attempt [to serve the proffered legitimate state interest] after nondiscriminatory alternatives have proved infeasible." 441 U.S. at 338. "It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively." *Id.* The Governor and the General Assembly never examined available mechanisms for addressing purported differences between in-state and out-of-state

MSW. They wanted to curb it, not manage it, and were not interested in less discriminatory alternatives.

b. The barging restrictions

Attempting to defend their untenable position that there existed no less discriminatory alternative than a total ban on barging MSW on Virginia's waterways, defendants contend that barges "have not been proven safe" and that "there are valid concerns regarding the risk of catastrophe should an incident occur." Br. 62-63; *see also* Br. 8-9. They also argue (Br. 63) that "the regulations being considered under the 1998 statute were insufficient to protect Virginia's waterways." *Id.* But the evidence clearly failed to establish that the barging restrictions were the least discriminatory means of serving Virginia's legitimate interest in protecting its waterways.

First, defendants presented no evidence that an environmental catastrophe could result from barging containerized MSW. They cite evidence that five MSW containers once fell off a barge into the Columbia River (JA 742), but have no evidence (and there is none) that the containers leaked or that any damage resulted.¹⁴

Second, there was no evidence that the regulations required by the 1998 statute

¹⁴ Plaintiffs also point to a spill in South Carolina in 1995 (JA 742), but have no evidence either that the waste was containerized or that there was resulting damage to the environment.

governing the shipment of MSW by vessel were insufficient. These regulations had not even been promulgated, much less tried and found wanting, when the General Assembly precipitously decided to ban barging. It is apparent, instead, that the sudden insistence on a “guarantee[.]” (Br. 9) that no MSW ever be released from a barge was a pretext for discrimination, especially in view of the fact that the General Assembly voted down an amendment that would have extended the three-river ban to barges carrying radioactive waste, petroleum products, explosives, fertilizers, chemicals regulated as hazardous substances, and any other potentially harmful products. JA 724A-724C.

c. The truck provisions

In defense of the truck provisions, defendants assert that regulations concerning transportation safety are entitled to “a strong presumption of validity.” Br. 63. But, as the Supreme Court made clear in the decisions cited by defendants (each of which held the highway safety provision at issue to violate the Commerce Clause):

This traditional deference “derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States’ economic interests, thus insuring that a State’s own political processes will serve as a check against unduly burdensome regulations.” *Less deference to the legislative judgment is due * * * where the local regulation bears disproportionately on out-of-state residents and businesses.*

Kassel, 450 U.S. at 675-676 (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S.

429, 444 n.18 (1978)) (citation omitted and emphasis added). Here, because Virginia has directed its regulatory efforts primarily at trucks importing waste, its legislative judgments concerning what is necessary for those trucks to travel the roads safely are highly suspect.

Defendants next assert that there was “an utter lack of evidence on the record of viable alternatives” (Br. 63-64) to the trucking provisions. But it was defendants’ burden to establish that there existed no less discriminatory alternatives to serve the interests advanced by the trucking provisions. They never even tried. And it is self-evident that any legitimate purposes served by the legislation would be served even better if Virginia did not exempt most trucks carrying in-state waste. Because the Commonwealth can easily accomplish its objectives through even-handed regulation, the discriminatory truck provisions fail strict scrutiny.

V. THE BARGING RESTRICTIONS ARE PREEMPTED.

Although the district court found it unnecessary to reach the issue, plaintiffs were entitled to summary judgment with respect to the barging restrictions because they are preempted by federal law. “The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States * * * was cited in the Federalist papers as one of the reasons for adopting the Constitution.” *United States v. Locke*, 120 S. Ct. 1135, 1143 (2000). Thus, federal law “regulates

much of the activity on or near navigable waterways.” *Beveridge v. Lewis*, 939 F.2d 859, 861 (9th Cir. 1991). While the states have “contributed to the provision of environmental and safety standards for maritime activities” (*Yamaha Motor Corp., U.S.A v. Calhoun*, 516 U.S. 199, 215 n.13 (1996)), state regulations that directly conflict with federal requirements or prevent them from achieving their purposes are preempted. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978); *Yamaha*, 516 U.S. at 215 n.13. The restrictions on barging that are challenged here meet that description.

A. Federal Laws Governing Commercial Shipping Preempt Virginia’s Ban On Barging MSW.

To the extent that they ban the shipment of MSW on Virginia’s navigable waters, the barging restrictions are preempted by federal laws governing the documentation, inspection, and safe operation of vessels. Commercial vessels must be enrolled and licensed, or “documented,” under federal procedures first established by the Enrollment and Licensing Act of 1793. *See Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 273 (1977). Documentation “authorize[s] * * * the vessel’s use in foreign, coastwise, or domestic trade.” H.R. REP. No. 96-428, at 8 (1979), *reprinted in* 1980 U.S.C.C.A.N. 7162, 7165. Under modern procedures, vessels of at least five

tons that are engaged in “coastwise trade”¹⁵ must secure a “certificate of documentation” with a “coastwise endorsement.” 46 U.S.C. §§ 12103, 12106. Such vessels also are subject to inspection by the Coast Guard to ensure that they are of suitable structure for their use, are in a condition to be operated safely, and comply with the Coast Guard’s standards for cargo vessels. 46 U.S.C. §§ 3301, 3305, 3306; 46 C.F.R. Ch. I, Subchapter I.

Vessels carrying MSW also must comply with the requirements of the Ports and Waterways Safety Act (“PWSA”), 33 U.S.C. §§ 1221 *et seq.*, which have the purpose of “reducing the possibility of vessel or cargo loss, protecting the marine environment, preventing damage to structures on or adjacent to navigable waters, and ensuring that vessels comply with applicable standards for safety and operation.” *Beveridge*, 939 F.2d at 861. The PWSA and its regulations establish standards for port and waterfront safety, vessel navigation, vessel operation, and traffic control. *See* 33 U.S.C. §§ 1223-1225, 1228; 33 C.F.R. Part 160. Such vessels are subject as well to the Shore Protection Act of 1988 (“SPA”), 33 U.S.C. §§ 2601 *et seq.*, which requires vessels transporting MSW in U.S. coastal waters to secure Coast Guard permits and adhere to procedures for the prevention and cleanup of releases. *See id.* § 2603.

¹⁵ The “coastwise trade” embraces the domestic transportation of passengers or merchandise involving travel to ports on the Atlantic or Pacific coasts. *See* 46 C.F.R. § 67.3; *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392, 396 (1901).

It long has been the law that “[a] state may not exclude from its waters a ship operating under a federal license.” *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447 (1960) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). The right to engage in “coastwise trade” under a federal license includes “the right to perform that additional act of landing cargo in the State[,] which [gives] the license its real value.” *Douglas*, 431 U.S. at 281. See *Puget Sound Stevedoring Co. v. Tax Comm’n*, 302 U.S. 90, 92 (1937) (“Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at [the] destination.”). Thus, although “States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power” (*Douglas*, 431 U.S. at 277), under the Supremacy Clause “no State may completely exclude federally licensed commerce.” *Id.* at 283 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

Yet that is precisely what Virginia has sought to do here. Each barge that plaintiff Hale plans to use to transport MSW has valid federal certificates of documentation and inspection authorizing it to operate in U.S. waters. See JA 488. Each barge also either already possesses or would secure a Coast Guard permit, issued under the SPA, that authorizes it to transport MSW in coastal waters. *Id.*¹⁶ Although

¹⁶ Although the SPA provides that it “does not affect the application of any other Federal or State law” (33 U.S.C. § 2622(a)), the statute nonetheless evinces a

these federal licenses do not “oust all state regulatory power” (*Douglas*, 431 U.S. at 277) over barges carrying MSW, such vessels may not be entirely deprived of their “unequivocal[] * * * authority” (*id.* at 276) to carry on their licensed activity.

The challenged provisions of Virginia law, which either explicitly or practically prevent such vessels from carrying on their federally-licensed activities, are not the “reasonable, nondiscriminatory conservation and environmental protection measures” (*id.* at 277) to which federally-licensed vessels may be subjected. Instead, Virginia’s prohibition on the shipment of MSW by barge is directly contrary to the federal judgment, reflected in the panoply of federal laws with which these vessels comply, that such barges *may* navigate and conduct their trade safely. “The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment.” *Ray*, 435 U.S. at 165. In sum, Virginia cannot totally ban the barging of MSW on navigable waterways, when the federal government has explicitly allowed that activity.

Congressional belief that MSW can be shipped safely and in compliance with environmental standards. Thus, regardless of whether state regulations designed to ensure safe operation of a vessel would be preempted by the SPA, a state law that entirely prohibits the transport of MSW by barge surely conflicts with and frustrates the purpose of the federal statute.

B. The Limitations On Stacking Of Containers Conflict With Federal Law Establishing Load Lines For Vessels.

The container-stacking limitation conflicts with federal laws establishing uniform rules for the maximum safe loading and stability of vessels. Federal law requires the Secretary of Transportation to assign to every covered vessel “load lines * * * that * * * indicate the minimum safe freeboard to which the vessel may be loaded.” 46 U.S.C. § 5104(a). In doing so, the Secretary must consider “the service, type, and character of the vessel,” “the geographic area in which the vessel will operate,” and “applicable international agreements.” *Id.* § 5104(b)(1-3). The load line assigned to each vessel must take into account the vessel’s stability and strength (*id.* § 5105(b)(2), (3); 46 C.F.R. §§ 42.07-35, 42.09-15) and may take heed of the weather or sea conditions in the geographic area where the ship operates (46 U.S.C. § 5104(e)).

Each vessel also must obtain from the American Bureau of Shipping (“ABS”) a certification that its load lines are marked correctly and that it is in compliance with other related requirements. 46 U.S.C. § 5106; 46 C.F.R. §§ 42.07-35, 42.07-45. When certifying a vessel, the ABS must consider, among other things, whether the hull and fittings of the vessel are sufficient to protect it from the sea and whether the strength of the hull and the stability of the vessel are adequate for all loading conditions. 46 U.S.C. § 5105(b); 46 C.F.R. §§ 42.07-35, 42.09-35.

The load line requirements include operational restrictions on loading. The statute provides that “[a] vessel may not be loaded in a way that submerges the assigned load line.” 46 U.S.C. § 5112(a). “A vessel may be operated only if the loading distribution, stability, and margin of strength are adequate for the voyage or movement intended.” *Id.* § 5112(c). The Coast Guard has prescribed additional requirements for the stability of vessels under its inspection authority. *See* 46 C.F.R. §§ 170.001 *et seq.*

Because the federal government has established standards for the safe loading of vessels, Virginia may not enact its own standards that ostensibly aim at the same object. *See Locke*, 120 S. Ct. at 1151 (“[t]he appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation”). Each of the barges that Hale would supply for moving the New York City MSW can operate in full compliance with all federal load line and stability requirements while carrying MSW containers stacked five high. JA 488-489. A single state may not mandate that these vessels carry less than half of their federally authorized load.

VI. THE COURT PROPERLY STRUCK DEFENDANTS’ AFFIRMATIVE DEFENSE.

Defendants alleged as an affirmative defense to plaintiffs’ Commerce Clause claims that “the acts of New York City and/or New York State to discourage or

prevent disposal of [MSW] in the City and in the State also violate the Constitution and public policy and distort interstate commerce.” JA 179. The district court’s decision to strike this defense (JA 218-222) was clearly correct.

As the district court noted, defendants’ theory that New York violated the Commerce Clause by exporting its waste was not merely “novel.” It was contradicted by “abundantly clear” case law providing that “the Commerce Clause is implicated when a state *restricts* the flow of waste across its borders,” not when “it *utilizes* the channels of interstate commerce to meet its waste disposal needs.” JA 220-221 (emphasis in original).

In any event, even if New York’s decision to close the Fresh Kills landfill could be said to have violated the Commerce Clause, that violation would not be an affirmative defense to plaintiffs’ claims because, as the district court explained, “[a] state may not escape responsibility for violating the Commerce Clause by pointing to another state’s violation.” JA 222. It is firmly established that discrimination by one state does not justify retaliation by another. *Limbach*, 486 U.S. at 278. A different rule would open the door “to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.” *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

CONCLUSION

The district court's decision granting summary judgment to plaintiffs should be affirmed.

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