

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No. 98-2683

NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION, SUPERIOR SERVICES, INC., LAND
RECLAMATION COMPANY, WASTE MANAGEMENT
OF WISCONSIN, INC., and THE SOLID WASTE
AGENCY OF LAKE COUNTY, ILLINOIS,

Plaintiffs-Appellees,

v.

GEORGE MEYER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN,
THE HONORABLE JOHN C. SHABAZ, JUDGE

BRIEF OF PLAINTIFFS-APPELLEES

PRELIMINARY STATEMENT

Since 1995, Wisconsin has endeavored to foist upon other sovereign States its own vision of the ideal recycling program. Rather than confining itself to exhortation, Wisconsin has instead resorted to coercion, threatening to obstruct the interstate commerce of its sister States unless they succumb to Wisconsin's demands. Wisconsin has now passed two statutes — the first of which this Court already has held unconstitutional, and the second of which is the subject of the present appeal — banning from

Wisconsin's landfills all waste generated in communities that fail to adopt and enforce a Wisconsin-dictated recycling law. It is undisputed that Wisconsin's current statutory ban, like its predecessor, *explicitly turns solely on the status of the law in the jurisdiction of origin of the waste*, rather than on any inherent qualities of a given waste load or even whether the waste has been subjected to rigorous recycling. Wis. Stat. Ann. §§ 287.07, 287.11; Wis. Admin. Code, Ch. NR ("NR") 544.04(2). Waste that is from a jurisdiction that has enacted Wisconsin's law is admitted; waste that is from a jurisdiction that has not is excluded, even if its content is identical to that of admissible waste.

This Court struck down the first of these statutes, Wis. Stat. Ann. § 159.11, in 1995, as a patent violation of the Commerce Clause of the Constitution. *See National Solid Wastes Management Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995) ("*NSWMA I*"). Foiled in its first effort to dictate the recycling laws of its sister States, Wisconsin returned to the drawing board. The result is Wis. Stat. Ann. § 287.11, a statute that, while differing cosmetically from Section 159.11, shares all of its constitutional infirmities.

Because the unconstitutionality of Section 287.11 is clear as a matter of law, and the factual disputes defendant invokes either are non-existent or are immaterial to the constitutional questions presented, the district court's ruling that the statute is unconstitutional should be affirmed.

JURISDICTION

Appellant's statement of jurisdiction is complete and correct.

ISSUES PRESENTED

1. Whether Wisconsin's ban on waste from jurisdictions that fail to enact a Wisconsin-dictated recycling law unconstitutionally encroaches upon the sovereignty of other States.

2. Whether Wisconsin’s waste ban violates the Commerce Clause.

STATEMENT OF FACTS

Because Section 287.11 is identical in all material respects to Section 159.11, a description of the original law and of the reasons this Court ruled it unconstitutional is necessary — and, indeed, virtually all that is necessary — to understand why Section 287.11 is unconstitutional.

A. Section 159.11

In 1990, Wisconsin enacted a law banning the disposal in Wisconsin of a comprehensive list of recyclable materials. *See* Wis. Stat. Ann. §§ 159.01-159.97 (1992) (recodified at Wis. Stat. Ann. §§ 287.01-287.11). Because it is virtually impossible to entirely exclude the banned materials from any given waste¹ load as Section 159.07 required (R-13 ¶ 14; R-33 ¶ 14; R-50 ¶¶ 42, 47 (SA-62-64)),² the law exempted waste generated in communities that adopted an “effective recycling program” approved by the Wisconsin Department of Natural Resources (“DNR”).

To dispose of waste in Wisconsin, therefore, a generator was required to persuade his or her community to enact and enforce an “effective recycling” law whose terms were dictated by Section 159.11. That provision mandated that the community’s law must (1) order residents to separate their waste or send it to a separation facility; (2) order building owners and tenants to participate in the community’s recycling program; (3) forbid anyone to dispose of or incinerate recyclables separated under Wisconsin’s program; (4) create a public education program designed to instruct citizens about the prohibitions against landfilling recyclables and the benefits of recycling; (5) create a system for collecting recyclables from local

¹ We use the terms “waste” and “municipal solid waste” interchangeably throughout this brief.

² We refer to our Supplemental Appendix as “SA” and Defendant-Appellant’s Appendix as “A.”

residences; (6) create a system for the processing and marketing of the recyclables collected by each community; and (7) mandate “adequate enforcement” of Wisconsin’s entire program. Implementing regulations also required communities annually to submit detailed documentation of their implementation and enforcement efforts to Wisconsin’s DNR for its review. NR 544.07, 544.10.

Rightfully jealous of their sovereignty, all but a handful of the out-of-state communities whose citizens had sent waste to Wisconsin declined to capitulate and adopt Wisconsin’s standards as of the time of the constitutional challenge to Section 159.11. Hence, Section 159.11 erected a wall around Wisconsin that prevented the importation of almost all municipal solid waste. *See* R-50 ¶¶ 32-33, 44, 49 (SA-60-61, 63; A-29); R-16 ¶¶ 18, 19 (SA-12) (when Section 159.11 was in effect, Waste Management’s Wisconsin landfills experienced over 98% reduction in the amount of out-of-state waste they received).

B. The Invalidation Of Section 159.11

NSWMA and several waste disposal companies challenged Section 159.11 in the United States District Court for the Western District of Wisconsin. That court upheld the “effective recycling program” requirement but this Court reversed. First, this Court explained, Section 159.11 violated the Commerce Clause’s prohibition against direct regulation of interstate commerce by requiring the application of Wisconsin law and Wisconsin standards to “commerce occurring wholly outside Wisconsin.” *NSWMA I*, 63 F.3d at 661. Second, the law impermissibly discriminated against interstate commerce by conditioning access to Wisconsin’s landfills on the status of the law in the jurisdiction in which the waste was generated. *Id.* at 661-662. The Court expressly considered and rejected Wisconsin’s argument that it lacked any nondiscriminatory means of reducing recyclables disposed of in Wisconsin, finding such means

— a requirement that waste be processed by a materials recovery facility (“MRF”) prior to disposal — in the statute itself. *Id.* at 662.

Third, the Court concluded that, even if its “characterizations of the Wisconsin scheme as discriminatory and a direct regulation of interstate commerce were found to be erroneous,” Section 159.11 “still could not pass muster under the test of *Pike v. Bruce Church, Inc.*, 397 US 137, 142 (1970).” *Id.* at 663. Any putative benefit that Wisconsin might derive from requiring an out-of-state community to enact and enforce the Wisconsin law was far outweighed by the burdens that such a requirement would place upon interstate commerce. *Ibid.*

Throughout its opinion, this Court condemned Wisconsin’s use of the threat of a trade blockade to force other sovereigns to adopt its recycling scheme. It observed, for example:

The Wisconsin statute creates an embargo on waste from a hauler from another state, or a community within that state, unless that political entity has decided to adopt the Wisconsin view of environmental management. No matter what the alternate approaches to recycling may offer in terms of environmental benefits and costs, a waste generator/hauler can pass the Wisconsin border only if its community has opted for the Wisconsin plan. Similarly, the Wisconsin disposal site is deprived of the waste from out-of-state not because it is more noxious than waste produced the Wisconsin way, but simply because it comes from a community whose ways are not Wisconsin’s
* * *

Id. at 661-662. *See also id.* at 660-661 (“[T]he Wisconsin statute seeks to force Wisconsin’s judgment with respect to solid waste recycling on communities in its sister states ‘at the pain of an absolute ban on the flow of interstate commerce.’”) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935)). In sum, this Court concluded, Section 159.11 plainly violated the Commerce Clause. The Supreme Court subsequently denied defendant’s petition for certiorari. *NSWMA I*, 517 U.S. 1119 (1996).

C. Section 287.11

Undeterred by this Court's constitutional ruling, Wisconsin returned to the drawing board to draft a functionally identical replacement statute. Wisconsin's new statute — Section 287.11 — is nothing more than a cosmetically tucked reenactment of Section 159.11. Although several changes were made, all the material unconstitutional provisions, save one, remain unaltered; and that alteration will have no discernibly mitigating effect.

Wisconsin purports to have eliminated all the constitutional infirmities in the prior statute by amending Section 159.11(2e). That section provided that “[a]n out-of-state unit's solid waste management program is an effective recycling program if it is in compliance with all recycling requirements imposed by the state in which the out-of-state unit is located and has all of the components under sub[section] (2).”

Wis. Stat. Ann. § 159.11(2e) (1992). The replacement provides:

An out-of-state unit's solid waste management program is an effective recycling program if it has all of the components under sub. 2 (a) to (em) and (f) to (i) and applies those components, as appropriate, to materials that are to be disposed of, converted into fuel or burned in this state and to persons who generate those waste materials.

Id. (Supp. 1998) (newly added material emphasized) (A-27).

This change leaves in place all of the constitutional flaws that caused the invalidation of the prior statute. Under the new statute, just as under the old one, out-of-state waste is banned from Wisconsin unless its jurisdiction of origin succumbs to Wisconsin's will by adopting Wisconsin's recycling law, using its public voice to endorse it, and appropriating funds to enforce it. The new statute continues expressly to discriminate on the basis of the status of the law of the jurisdiction in which the waste is generated. And like the old statute, the new statute will have the practical effect of regulating commerce occurring entirely outside of Wisconsin because, as the State itself has argued (*NSWMA I*, 63 F.3d at 662) and its own

experts have conceded (R-42 Exh. O (SA-39)), it will be infeasible for an out-of-state jurisdiction to administer a “split ordinance” mandating compliance with Wisconsin laws as to some waste, its own laws as to other waste, and possibly other States’ laws as to the remainder.

D. The Invalidation of Section 287.11 By the Court Below

The district court was not deceived by the statute’s slightly altered appearance. Observing that “[i]n most relevant respects the law has been left as it was” when the Seventh Circuit first invalidated it, the district court granted plaintiffs’ motion for summary judgment, holding the revised statute unconstitutional. First, the court held, Section 287.11 unconstitutionally mandates that “[o]ut-of-state waste can be disposed of in Wisconsin only if the community where the waste originates adopts an ordinance which incorporates the mandatory components of the Wisconsin recycling program into its laws.” R-57-7 (A-8). Echoing this Court’s observations in *NSWMA I* that Wisconsin had improperly used a trade embargo to bend other States to its will, the district court explained that such conditional embargoes intrude upon the sovereign prerogatives of other States, “impos[ing] [Wisconsin’s] policy choices upon its neighbor[s].” R-57-13-14 (A-14-15). That, the court indicated, is a *per se* constitutional violation. *See ibid.*

Next, the district court held, by “condition[ing]” the entry of out-of-state waste into Wisconsin “upon the enactment of Wisconsin’s recycling program by the out-of-state community,” the law “continue[s] to discriminate against out-of-state waste on the basis of the status of the law in the community of origin.” R-57-13 (A-14). The court observed (*ibid.*) that the statutory revisions had not altered that discrimination or the existence of non-discriminatory alternatives in the slightest — a fact “which dooms the statute to fail” not only under the strict scrutiny applicable to such facially discriminatory statutes but also “under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).” The court identified two such

alternatives about which there could be no genuine factual dispute. First, defendant himself repeatedly argued in his briefs on summary judgment that waste *haulers* have the “ability to achieve the goals of the Wisconsin legislature” by “effectively implement[ing] *on their own* effective recycling which would remove recyclables from the waste stream.” R-57-15 (A-16) (emphasis added). Thus, rather than imposing those obligations on other sovereigns, Wisconsin could impose them on haulers by contract or condition of access to Wisconsin disposal facilities. *Id.* Second, it was too late to dispute the existence of the MRF option: this Court “ha[d] previously determined [in *NSWMA I*], in view of a full record on appeal including defendant’s evidence presented at trial,” that Wisconsin “could realize its goal to conserve landfill space and protect the environment by mandating that all waste entering the state first be treated at a materials recovery facility.” *Id.*

The district court additionally concluded that there was no genuine dispute that “the practical effect of the legislation” would be to “require[] out-of-state communities to apply Wisconsin’s program to all waste whether bound for Wisconsin or not.” R-57-11 (A-12). The court pointed (R-57-11-12 (A-12-13)) to the statement of defendant’s own expert, Catherine Cooper (R-42 Exh. O (SA-39)) that administration of a “split ordinance” mandating compliance with Wisconsin law as to Wisconsin-bound waste and home-state laws as to waste not bound for Wisconsin would be infeasible. The court cited Cooper’s testimony that it is difficult for a community to “send two messages at once where one sector is required to recycle and another is not,” especially when the State itself would have no way of knowing which generators were sending waste to Wisconsin. R-57-12 (A-13) (paraphrasing R-42 Exh. O (SA-39)). Based on defendant’s concessions, the court concluded, there was no genuine dispute that it would be impossible for a State to target Wisconsin-mandated education and enforcement efforts solely at those

citizens (an ever-changing group) who generated waste bound for Wisconsin, while remaining free to advocate and enforce its own policies with respect to other citizens. R-57-12-13 (A-13-14). Accordingly, Wisconsin's law meant that, if out-of-state citizens were to have access to Wisconsin landfills at all, their jurisdictions would be forced to adopt Wisconsin's recycling law as applied to *all* their waste, including waste Wisconsin would never see: an extraterritorial regulation of commerce that this Court already had held violated the Commerce Clause. *See* R-57-4 (A-5) (quoting *NSWMA I*).

SUMMARY OF ARGUMENT

The district court correctly concluded that Wisconsin's amendment of its recycling statute has done little to ameliorate the constitutional infirmities that caused this Court to invalidate the statute in *NSWMA I*. Chief among those infirmities is that the law persists in intruding upon the sovereignty of Wisconsin's sister States. Just like Section 159.11, Section 287.11 uses the threat of a border blockade as a means of arrogating the enforcement power, budget, and even public voice of other sovereigns to execute Wisconsin's own policy objectives. For that reason alone, Section 287.11 is unconstitutional.

Section 287.11 also continues to violate the Commerce Clause. It discriminates facially against out-of-state waste generators on the basis of the status of the law in their home jurisdictions; and it will have a dramatically and differentially restrictive effect on the importation of waste from out-of-state communities, few of which have consented to subject themselves to Wisconsin's dominion. As with Section 159.11, the existence of at least one less discriminatory alternative is undeniable; indeed the record irrefutably establishes the existence of *three*. First, defendant has repeatedly conceded that each of the critical elements of Wisconsin's recycling law, including enforcement of the mandatory source separation rules,

could be accomplished by haulers at least as effectively as by the out-of-state sovereigns on whom the law currently inflicts its burdens. Second, the text of the Wisconsin statute itself suggests that the use of performance standards measuring the amount of recyclables diverted or the quality of recycled waste is an effective means of reducing the recyclable content of waste destined for Wisconsin's landfills. Third, this Court already has ruled that a requirement that waste be subjected to separation at a MRF before burial is a viable alternative to Wisconsin's differential waste ban.

Section 287.11 also fails even the more lenient *Pike* balancing test applicable to wholly nondiscriminatory laws, because its burdens on interstate commerce and sovereignty greatly outweigh the minimal benefits Wisconsin derives from regulating the laws of other States, rather than regulating the content of waste that enters the State more directly. *See NSWMA I*, 63 F.3d at 663.

Finally, Section 287.11 continues to have the impermissible practical effect of regulating commerce that occurs wholly outside of Wisconsin. Because it is not feasible to administer a "split ordinance," under which several States' different recycling laws must be applied to different waste depending upon where the haulers choose to ship it, jurisdictions will be forced to apply Wisconsin's law either to all of their waste or to none at all. As a result, on those rare occasions when an out-of-state jurisdiction chooses to submit to Wisconsin's stringent requirements, Wisconsin's recycling law will dictate the treatment of *all* of that jurisdiction's waste, including waste that will never reach Wisconsin. Such an extraterritorial effect is *per se* unconstitutional.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994). To prevent summary judgment, “[t]he non-moving party * * * must identify specific facts to establish that there is a genuine triable issue” and “show[] more than mere metaphysical doubt as to the material facts.” *Smith v. Severn*, 129 F.3d 419, 425 (7th Cir. 1997) (citation omitted). If the nonmovant fails to present evidence sufficient to sustain a verdict in his favor, this Court will affirm the grant of summary judgment. *Ibid*.

ARGUMENT

I. SECTION 287.11 IS *PER SE* UNCONSTITUTIONAL BECAUSE IT INTRUDES UPON THE SOVEREIGNTY OF WISCONSIN'S SISTER STATES

Few principles are more deeply embedded in the constitutional structure of our Nation than “the autonomy of the individual States within their respective spheres.” *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989). *See also Printz v. United States*, 117 S. Ct. 2365, 2376 (1997) (the principle that the States “retain[] ‘a residuary and inviolable sovereignty’” within their borders “is reflected throughout the Constitution’s text”) (quoting THE FEDERALIST No. 39, at 245 (J. Madison)); *id.* at 2381 (“It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”). Under our Constitution, the States are coequal sovereigns, each governing with independent authority its own territory within a federal system. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 89 (1985) (“The States are equal to each other ‘in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.’”) (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911)).

As the Supreme Court recently reaffirmed, the indispensable constitutional corollary to that principle of coequal state sovereignty is that “no single State” may “impose its own policy choice on

neighboring States.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996). The sovereignty of each State implies a limitation on the sovereignty of all others. *See ibid.* *See also Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.”). Within its territory, therefore, every State possesses exclusive authority to legislate (in those areas not expressly reserved for Congress) free from the intrusion of other sovereigns. *See Printz*, 117 S. Ct. at 2381.

Accordingly, in a wide range of contexts and under various constitutional provisions (including the Commerce, Full Faith and Credit, and Due Process Clauses), the Supreme Court has consistently condemned States’ efforts to project their laws and regulatory policies across their borders into the territories of their sister sovereigns. *See, e.g., Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction.”); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (“A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.”); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State, * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question * * * .”); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“[l]aws have no force of themselves beyond the jurisdiction of the state which enacts them”); *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 504-505 (1939) (“Full faith and credit does not here enable one state to legislate for the other or to project its laws across

state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.”); *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality) (“any attempt “directly” to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power”) (citation omitted); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582-583 (1986) (condemning New York’s attempt to “project its legislation” into other States); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) (condemning a municipality’s regulatory effort to reduce the deleterious effects of out-of-town disposal sites because “[t]o do so would extend the town’s police power beyond its jurisdictional bounds”); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976) (“Mississippi is not privileged under the Commerce Clause to force its own judgments as to an adequate level of milk sanitation on Louisiana at the pain of an absolute ban on the interstate flow of commerce in milk.”).

Section 287.11 flagrantly violates this constitutional principle. Not only has Wisconsin endeavored to “impose its own policy choice[s] on neighboring States” (*BMW*, 517 U.S. at 571),³ it has attempted to commandeer the core sovereign powers of those sister States to implement them. Specifically, Section 287.11 endeavors to arrogate the legislative, police, and even taxing and spending powers of out-of-state sovereigns by coercing them (by threat of a trade embargo) to enact, enforce, and devote resources to implement Wisconsin’s law. Section 287.11 explicitly requires out-of-state sovereigns to subordinate their

³ In an effort to distinguish *BMW*, defendant denies that “Wisconsin is attempting to impose its own policy choices on other states,” which it purports to agree “are assuredly free to fashion their own regulatory approaches to solid waste management within their borders.” Br. 41. But that is *precisely* what Wisconsin is doing. Rather than monitoring the waste that goes into its landfills, Wisconsin is monitoring the legislation of other States, attempting to force *them* to monitor the waste that goes into Wisconsin’s landfills (and, as a practical matter, even the waste that does not). It is difficult to imagine a starker instance of a State “impos[ing] its policy choice[s] on other States.” *BMW*, 517 U.S. at 571.

own policy choices to Wisconsin's by mandating, under pain of a commerce ban, that they enact a law dictated by Wisconsin. Adding insult to injury, Section 287.11 coerces other sovereigns to use their public voices to conduct "public education" programs advocating and endorsing not their own, but Wisconsin's, policy choices. Thus, the statute would, for example, require an Illinois community to conduct or sponsor a public education program advocating (and threatening to enforce) a mandatory recycling program for Wisconsin-bound waste, even if such a mandatory program might directly conflict with that community's own public policies. SWALCO communities, for example, expressly considered and rejected a Wisconsin-style program, opting instead for effective but different recycling programs. R-15 ¶¶ 3-6.⁴ Wisconsin's law attempts to force those communities to abandon those policy choices as a condition of unfettered commercial access to Wisconsin's landfills.

Section 287.11 also explicitly commandeers the taxing and appropriations functions of other sovereigns by requiring them to provide the equipment, supplies, and personnel necessary to implement and enforce the Wisconsin-dictated ordinances. And, as interpreted by DNR, Section 287.11 subordinates those sovereigns to Wisconsin by requiring them to keep records for Wisconsin's use and to submit annual reports to DNR so that it can review the sufficiency of their efforts. NR 544.07, 544.10. This unprecedented effort to control coequal sovereigns renders Section 287.11 irredeemably unconstitutional.

⁴ Wisconsin's recycling agenda likely will conflict with the recycling policies of most out-of-state communities. Although "[t]he vast majority of states, and the federal government, have enacted policies to promote the same goal — the reduction of landfilling through increased recycling," Wisconsin's own multi-point recycling program remains absolutely "unique among the states." R-22 ¶¶ 3, 5 (SA-21-22).

Defendant complains (Br. 40) that the “district court * * * cited no authority for the existence of a *per se* rule” against a State “requiring” other States to “regulate[] in a particular way” if that “is the most effective means of achieving the state’s legitimate goals” and Wisconsin subjects its own citizens to similar regulations. *See also id.* at 38. But, as the cases described above (at pp. 10-12) establish, the constitutional principle of coequal state sovereignty prohibits a State from “requiring” (Br. 40) another State or its municipalities to do anything. No State is empowered to use threats to commandeer another sovereign’s legislature or town council, dragoon its employees, drain its treasury, and force it to fine its citizens, all to effectuate the first State’s own policy goals. To permit that kind of encroachment on a State’s core powers, whenever forcibly enlisting another State’s assistance would be “the most effective means of achieving the [regulating] state’s legitimate goals,” would destroy the very nature of our Federal system. Just last Term, the Supreme Court declared that the Federal government itself lacks the power to intrude upon and arrogate thusly a State’s core powers (*Printz*, 117 S. Ct. at 2380-2381); “[t]he States are,” of course, “no less sovereign with respect to each other than they are with respect to the Federal Government.” *Heath*, 474 U.S. at 482.

Courts frequently have condemned the practice, exemplified by Section 287.11, of holding interstate commerce hostage to coerce other States to enact legislation furthering the enacting State’s parochial policy goals. In *Cottrell*, for instance, the Supreme Court declared that “a State may not ‘use the threat of economic isolation as a weapon to force sister States’” to adopt its legislative standards. 424 U.S. at 379. *See also id.* at 380 (“Mississippi is not privileged under the Commerce Clause to force its own judgments as to an adequate level of milk sanitation on Louisiana at the pain of an absolute ban on the interstate flow of commerce in milk.”). This Court reached the same conclusion in *NSWMA I*, rebuking Wisconsin for attempting to impose its policy choices regarding recycling upon its neighbors by threat of an embargo. 63 F.3d at 660-661. From the perspective of state sovereignty, the flaw in Section 159.11

was that it required out-of-state communities to adopt and enforce Wisconsin law (on pain of not being permitted to export their waste to Wisconsin) and thereby deprived those communities of the discretion to set their own policies and enact their own laws. Section 287.11 retains, unaltered, precisely the same defect.

Defendant insists, however, that Section 287.11 regulates only “disposal of solid waste occurring inside its own territory” and hence does not infringe state sovereignty. Br. 41. But that assertion is false. Section 287.11 attempts to regulate not merely *disposal*, but other States’ *regulation* of disposal; and it is that effort that transgresses the sovereignty of other States. *Cf. Printz*, 117 S. Ct. at 2379 (even Congress lacks the power “to regulate state governments’ regulation of interstate commerce”) (citation omitted).

The two cases relied upon by defendant (Br. 41) — *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), which upheld a Minnesota law prohibiting in-state sales of milk in plastic containers, and *Maine v. Taylor*, 477 U.S. 131 (1986), which upheld a state law banning the import of live bait fish — are inapposite. Minnesota did not command other sovereigns to outlaw the production of plastic containers. Nor did Maine direct other sovereigns to impose a particular regulatory scheme upon their fisheries to eliminate the risk of a virus in fish exported to Maine. Instead, those States applied their laws only to private actors. Section 287.11 is wholly different in kind. It directs out-of-state communities to enact and implement Wisconsin law to Wisconsin’s satisfaction. What defendant fails to grasp, in short, is that the problem with Section 287.11 is not that it “requires some action by those generating waste in neighboring states” (Br. 41), but that it impresses neighboring States themselves (or their subdivisions) into Wisconsin’s service.

Finally, defendant evinces a profound misunderstanding of our Nation’s federal system when he castigates the district court for failing to consider “the impact of [its] decision on the sovereignty of Wisconsin,” which he insists “will be impaired if [Wisconsin] is barred” from arm-twisting its sister States into adopting its recycling legislation. Br. 42. *See also id.* at 12. Although Wisconsin has the power to regulate the content of the waste disposed of in its facilities, it lacks the power to commandeer the legislative authority of other sovereigns. The power to enact legislation compelling nationwide compliance with Wisconsin’s recycling program is vested exclusively in legislators in Washington, not in those in Madison. *See BMW*, 517 U.S. at 571 (“while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States”). Because Wisconsin has assumed for itself power vested in Congress and has sought to make its law the law in other States, Section 287.11 is *per se* unconstitutional.

II. SECTION 287.11 VIOLATES THE COMMERCE CLAUSE

Exactly like its predecessor, Section 287.11 violates the Commerce Clause in three distinct ways. *See NSWMA I*, 63 F.3d at 658-663. First, it discriminates against interstate commerce by conditioning access to Wisconsin disposal facilities on the status of the law of the jurisdiction of origin, notwithstanding the existence of far less discriminatory and intrusive alternatives for reducing the recyclables that are deposited there. Second, its burdens far outweigh its benefits even under the *Pike* balancing test, especially in light of the existence of alternatives that would accomplish Wisconsin’s goal equally effectively. Third, although Wisconsin has tacked a clause onto the statute purporting to limit its reach to waste shipped to Wisconsin, the statute as a practical matter will continue to regulate, impermissibly, commercial transactions

with no connection to Wisconsin. Each of these features independently compels invalidation of the statute.

A. Section 287.11 Impermissibly Discriminates Against Interstate Commerce

1. Section 287.11 discriminates on its face and in practical effect

Wisconsin's recycling law continues to discriminate against interstate commerce in *exactly* the same manner as it did the last time this Court reviewed it: it conditions a waste generator's access to Wisconsin's markets on the status of the law in the generator's State or community. This Court already has explicitly held that that feature of Wisconsin's waste ban "work[s] a discrimination on interstate commerce" that is unconstitutional. *NSWMA I*, 63 F.3d at 661-662. *See also id.* (condemning the law because "[n]o matter what the alternate approaches to recycling may offer in terms of environmental benefits and costs, a waste generator/hauler can pass the Wisconsin border only if its community has opted for the Wisconsin plan").

None of the modifications Wisconsin has made to the statute altered (or was even designed to alter) the statute's explicit discrimination on the basis of the status of the law in other jurisdictions.⁵ Thus, this Court is presented with an issue identical to the one it decided against defendant in *NSWMA I* in a holding necessary to its decision. *See* 63 F.3d at 661-662. Under the doctrine of collateral estoppel, that decision is conclusive here. *See Kunzelman v. Thompson*, 799 F.2d 1172, 1176 (7th Cir. 1986). As we show below, the Court's decision in *NSWMA I* is not only conclusive, but correct.

⁵ The only significant modification defendant has made to the statute since this Court invalidated it in *NSWMA I* was purportedly to limit its extraterritorial reach. But that factor had no bearing on this Court's finding of discrimination. *See* 63 F.3d at 661-662.

a. Section 287.11 facially discriminates between different waste loads based on the status of the law in the community in which the waste is generated

The facial discrimination is apparent from the text of the statute itself. Section 287.11 explicitly distinguishes among different loads of waste based solely upon the status of the law of their communities of origin. Before admitting out-of-state waste, Wisconsin does not say “tell me what is in this waste.” Nor does it even say “tell me whether this waste has been subjected to rigorous recycling.” Instead, it demands: “tell me where this waste is from.” If Wisconsin determines that the waste is from a community that has enacted the Wisconsin law, then that waste is admitted to Wisconsin. Waste that is not from an approved community is excluded, even if its recyclable content is otherwise identical to, or even markedly lower than, that of admissible waste.

The Supreme Court has held that such provisions, which confer different treatment depending solely upon the status of the law of another State, are facially discriminatory. In *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), for example, the Court held that an Ohio law giving a tax credit for fuels containing ethanol produced either in Ohio or in a State that had passed a law granting a credit to fuels containing Ohio ethanol “on its face appears to violate the cardinal requirement of nondiscrimination” and therefore was subject to the “strictest scrutiny.” *Id.* at 274-275 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). The Court explained that the Ohio provision “explicitly deprives certain products of * * * beneficial * * * treatment *because they are made in certain other States.*” *Ibid.* (emphasis added). Just like the Ohio law, Wisconsin’s recycling law withholds a benefit (there, a tax credit; here, access to landfills) based solely on the status of the law of the State of origin. *See also Sporhase v. Nebraska*, 458 U.S. 941, 957-958 (1982) (holding that a Nebraska law conditioning other States’ access to Nebraska’s

water on their adoption of a policy granting reciprocal rights to Nebraska citizens was “facially discriminatory” and therefore subject to the “strictest scrutiny”) (citation omitted); *Austin v. New Hampshire*, 420 U.S. 656 (1975).

At least three other courts of appeals have reached similar conclusions. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 791 (4th Cir. 1991) (expressing disapproval of a South Carolina ban on waste from States that South Carolina had concluded had failed to enact sufficiently environmentally protective laws, because “South Carolina does not appear to have been empowered to [penalize]” other States); *NSWMA v. Alabama Dept. Env'tl. Mgt.*, 910 F.2d 713, 717, 720 (11th Cir. 1990) (condemning a ban on waste from States whose laws and environmental policies Alabama deemed inadequate), *modified*, 924 F.2d 1001 (1991); *Hardage v. Atkins*, 619 F.2d 871, 873 (10th Cir. 1980) (“Oklahoma cannot ‘use the threat of economic isolation as a weapon to force’ other states to enact substantially similar legislation * * *.”) (citation omitted) (quoted with approval in *NSWMA I*, 63 F.3d at 660).

Defendant suggests (Br. 17) that Section 287.11 is nondiscriminatory because it “even-handed[ly]” “imposes exactly the same conditions on out-of-state waste and out-of-state communities as on in-state waste and in-state communities.” But the fact that in-state communities must overcome similar obstacles to commerce is of no consequence. “The [statute] is no less discriminatory because in-state or in-town [generators] are also covered by the prohibition.” *Carbone*, 511 U.S. at 391. *Accord Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. Natural Resources*, 504 U.S. 353, 361-362 (1992) (“a State * * * may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself”); *Dean Milk Co. v. City*

of Madison, 340 U.S. 349, 354 n.4 (1951) (it is “immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce”). The fatal flaw of Section 287.11 is that it discriminates on the basis of a characteristic (the status of the law) that is inextricably linked to location. It is equally as discriminatory as would be a ban on imports from any jurisdiction (in-state or out-of-state) the name of which begins with “I”; like such a ban, it facially contravenes the most basic Commerce Clause rule that trade barriers may not be erected around territorial borders. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1599 (1997) (“one of the central purposes of [the] negative Commerce Clause” is to “[a]void[] th[e] sort of ‘economic Balkanization’” that causes “commerce [to] be halted at state lines”) (citations omitted).

In addition, Section 287 explicitly imposes upon out-of-state citizens a substantial burden that Wisconsin citizens do not bear: that of persuading their local legislatures to enact a Wisconsin law managing solid waste in a manner that conforms with Wisconsin’s waste priorities. *See Wis. Stat. Ann. §§ 287.09(2)(a), 287.07(1m) - (4), 287.05(12)*. The very same law that bans waste from out-of-state communities unless they enact the Wisconsin-dictated ordinance (*id.* § 287.07) mandates that all Wisconsin communities adopt a municipal solid waste management system, whose chief components include the central features of that ordinance (*see id.* § 287.11). Specifically, all Wisconsin communities are required by law to develop a program for the “separat[ion], collect[ion], stor[age], process[ing] and market[ing] solid wastes” (*id.* § 287.09(2)(b)(2)) that effectuates the State’s ban on recyclables (*id.* § 287.07(1m)-(4)) and priorities of recycling, reusing, and reducing the amount of municipal solid waste (*id.* § 287.12(a)-(c)). That mandate is, of course, satisfied by adoption of Section 287.11. Out-of-state communities, in contrast,

may not similarly be required to adopt a law consistent with Wisconsin's priorities.⁶ Thus, Wisconsin's law explicitly gives in-state generators a significant advantage over out-of-state generators in persuading their jurisdictions to enact Section 287.11, which is an absolute predicate to access to Wisconsin disposal facilities.⁷

As we next explain, the discrimination in Section 287.11 based on the status of the law of the originating community results in dramatically different access for out-of-state waste and in-state generators to Wisconsin's disposal facilities.

b. Wisconsin's waste ban will have a dramatically disparate effect on out-of-state waste, banning almost all out-of-state waste from Wisconsin while allowing all in-state waste to be disposed of there

The record unequivocally confirms this Court's conclusion that "Wisconsin's effective recycling program legislation 'discriminate[s] in practical effect against interstate commerce.'" *NSWMA I*, 63 F.3d

⁶ In addition, other jurisdictions may have their own parochial reasons for *precluding* their citizens from exporting waste to Wisconsin, perhaps to redirect waste to their own, governmentally owned facilities. Wisconsin's law empowers those communities to restrict the flow of commerce by declining to accede to Wisconsin's demands. Section 287.11 therefore enables other States to accomplish a restriction of commerce through inaction that the Commerce Clause would forbid if accomplished directly. For example, an effort by Hennepin County, Minnesota (which borders Wisconsin) to prohibit exportation of waste generated within its borders was recently held unconstitutional. *See Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir.), *cert. denied*, 118 S. Ct. 629 (1997). But Hennepin County can accomplish much the same export ban simply by refusing to adopt Section 287.11.

⁷ Defendant also appears to suggest (Br. 38-40) that the waste ban is nondiscriminatory because, unlike with other reciprocity statutes, the status of the law in the community of origin actually "makes a substantive difference in the content of the waste remaining for disposal": waste from a State that mandates recycling will, he claims, have fewer recyclables in it. But that argument is not relevant to the question whether Section 287.11 discriminates on the basis of the status of the law in the community of origin; there can be no dispute that it does, explicitly. *See* Wis. Stat. Ann. § 287.11. Instead, defendant's argument is directed to the issue of whether the law survives the strict scrutiny to which such discriminatory legislation is subjected, *i.e.*, whether the use of an out-of-state community's law as a proxy for waste content effectuates a legitimate purpose and whether any effective, less discriminatory alternatives exist. As we show below in Section II(A)(2), that argument — that the status of the law in other States is a reliable proxy for waste quality for which there is no substitute — lacks any support.

at 661. It is undisputed that while *all* in-State communities have “effective recycling programs” (R-42 Exh. P, at 2 (SA-47)), very few out-of-state communities that, prior to the ban, shipped substantial amounts of waste to Wisconsin landfills for disposal have applied for or received approval from the Wisconsin DNR to operate “effective recycling programs.” R-50 ¶¶ 32-33, 44, 49 (SA-60-61, 63; A-29). *See also* R-22 ¶ 7 (SA-22). Thus, if permitted to go into effect, Wisconsin’s waste ban indisputably would exclude *no Wisconsin waste*, while barring *the vast bulk of out-of-state waste*.⁸ “When the [discriminatory] effect” of the legislation is that “powerful, acting as an embargo on interstate commerce without hindering intrastate sales, the [Supreme] Court treats it as equivalent to a statute discriminating in terms.” *National Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995). A clearer case of discriminatory impact than this one can hardly be imagined. *Cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 196 & n.12 (1994) (invalidating a pricing order that was likely to have the discriminatory effect of “caus[ing] local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market”) (citation omitted); *Kassel v. Consolidated Freightways*

⁸ The possibility that out-of-state communities “could shield [their] residents” from Wisconsin’s discriminatory ban by passing the Wisconsin law does not cure the constitutional defect of the discrimination. *Austin*, 420 U.S. at 666-667. The Supreme Court has repeatedly held that it is the current state of affairs that counts: the constitutionality of a law cannot be evaluated on the presumption that other States will enact particular legislation. *See id.*; *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 82 (1920) (“New York has no authority to legislate for the adjoining states; and we must pass upon its statute with respect to its effect and operation in the existing situation.”). In any event, the parties agree that if the last waste ban is any indication — and it must be, as there is no reason that out-of-state communities would be significantly more inclined to subject themselves to the restrictions of this Wisconsin law than the last — this ban will cause the volume of out-of-state waste accepted by Wisconsin facilities to plunge precipitously. R-50 ¶ 49 (A-29) (“If the ‘effective recycling program’ requirement is permitted to go into effect, and only those 14 out-of-state communities whose recycling programs were previously approved as ‘effective’ under Wis. Stat. § 159.11 apply for and gain Wisconsin approval of their recycling programs, at least approximately 95% of the out-of-state municipal solid waste currently disposed of in Wisconsin will be excluded from disposal in Wisconsin as of October 1, 1999.”). *See also id.* at ¶¶ 32-33 (SA 60-61); R-16 ¶¶ 18, 19 (SA-12); R-18 ¶ 4 (SA-14).

Corp., 450 U.S. 662, 676 (1981) (differential burden); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 781-782 (1945) (same).

2. The record unequivocally establishes the existence of not just one, but three, less discriminatory alternatives to Section 287.11

A statute that discriminates against out-of-state commerce either explicitly or in substantial practical effect is subject to the “strictest scrutiny.” *New Energy*, 486 U.S. at 274 (quoting *Hughes*, 441 U.S. at 337); *Sporhase*, 458 U.S. at 957-958 (same). Wisconsin’s waste ban suffers from both defects. And as defendant correctly concedes (Br. 16), strict scrutiny is almost always “fatal” in fact. *Camps Newfound/Owatonna*, 117 S. Ct. at 1601. “When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court generally has ‘struck down the statute without further inquiry.’” *NSWMA I*, 63 F.3d at 657 (quoting *Brown-Forman*, 476 U.S. at 579). *See also National Paint*, 45 F.3d at 1131 (facially discriminatory statutes and statutes with ‘powerful’ discriminatory effects are both subjected to the most rigorous scrutiny). Defendant therefore bears “an extremely difficult burden” to prove that no less discriminatory alternatives exist. *Camps Newfound/Owatonna*, 117 S. Ct. at 1601.

Defendant has failed to meet his burden on summary judgment of presenting a genuine issue of material fact about the existence of a less discriminatory alternative. That is not surprising: we cannot imagine any circumstance in which the only means by which a State can accomplish its regulatory goals is by insisting that other sovereigns adopt and enforce regulations, rather than by regulating the subject of its concern directly. If Wisconsin’s goal is to limit the recyclables that enter its landfills, it surely can mandate

that result directly rather than by commanding other sovereigns to achieve that goal on its behalf.

a. Defendant not only does not dispute, but affirmatively argues, that haulers can effectively run and enforce a mandatory source separation program for waste destined for Wisconsin

In an apparent effort to divert attention from the primary viable alternative the district court found, defendant rebuts the viability of an alternative the district court never addressed. We are unable to find any explicit discussion in the district court’s opinion to the alternative defendant alleges was improperly “found by the district court — inspection of individual loads of garbage at the landfill to ascertain the degree of recycling.” Br. 36-38.⁹ The alternative the district court *did* consider at the cited page (R-57-15 (A-16)) is that the “*components of the recycling program*” “such as establishing a collection system and adopting a system for processing and marketing recyclables *can be performed by waste haulers,*” rather than by the other sovereigns on whom the law currently imposes those obligations, “*as a condition of their license or [by] agreement.*” *Id.* (emphasis added). And that alternative — requiring haulers, rather than other States, to mandate and monitor recycling as a condition of access to Wisconsin landfills — is an alternative defendant never mentions, much less disputes.

Defendant’s reluctance to debate the feasibility of that alternative is not surprising, since, as the district court correctly noted (R-57-15 (A-16)), it was defendant who established its existence and feasibility in the first place. Defendant and his experts repeatedly declared throughout the proceeding below that haulers can perform the duties currently imposed on Wisconsin’s sister States and their subdivisions at least as efficiently and effectively. To sample but a few such concessions:

⁹ Because the existence of three viable alternatives is clear from the record, it is unnecessary for plaintiffs also to argue the issue of border inspections as an alternate ground for affirming the district court’s decision.

An out-of-state community can rely on the haulers to implement many of the features of an effective recycling program, such as establishing collection, processing and marketing systems, notifying generators whose waste might be transported to Wisconsin of the requirement to separate the listed recyclables, educating the public, keeping records and filing reports, as well as to ensure compliance by generators with program requirements.

R-34 ¶ 3.

Many of the responsibilities about which plaintiffs complain can be placed on the shoulders of the waste haulers, as a condition of licensure, such as the notification of customers of the separation requirement; education efforts; and recordkeeping and reporting requirements. * * * This is precisely what many Wisconsin communities already do.

R-30 pp. 11-12 (SA-25-26).

[T]he hauler [could be required to] notify a waste generator whose waste might be transported to Wisconsin of the requirement to separate the listed recyclables. In addition, the haulers can be required to implement many of the other features of the program, such as establishing collection, processing and marketing systems, notifying generators and educating the public, keeping records and filing reports.

R-32 ¶ 4 (A-45).

Many of the items listed [in the Wisconsin recycling statute], such as establishing a public education program (a.)(1); establishing a collection system (a.)(6); adopting a system for processing and marketing recyclables (a.)(7); provision of equipment or means necessary to implement the requirements (a.)(9); record-keeping (b.)(2); and filing an annual report (b.)(3), can all be performed by waste haulers * * *.

R-33 ¶ 15(a) (A-24).

Indeed, defendant's experts stated that haulers can effectively perform not only those structural and educational aspects of the statute, but even the quasi-sovereign functions of *mandating* and *enforcing* compliance with the recycling rules, all as a condition of their contracts:

An out-of-state community can also rely on the hauler to ensure that a generator, if its waste is bound for Wisconsin, separates the listed recyclable materials. Many Wisconsin communities do precisely this; i.e. they require the hauler to ensure compliance with the program requirements. The

hauler can be subject to specific requirements, through a license or contract, to provide the community assurance of compliance by generators sending waste to Wisconsin.

R-31 ¶ 10 (A-42). Enforcement would be simple: haulers would be required by contract with the Wisconsin facility to decline to accept the waste of any generator who does not engage in source separation. *See id.*¹⁰

In sum, defendant has affirmatively argued that virtually every aspect of its recycling program can be performed not only as effectively, but at least as efficiently, by waste haulers.

Defendant nonetheless can be expected to persist in maintaining that the only effective recycling program is a sovereign-imposed recycling program. Defendant argues (Br. 38-40), for instance, that “requiring mandatory source separation for a waste stream makes a substantive difference in the content of the waste streamlining for disposal, as opposed to leaving recycling voluntary.” Similarly, defendant trumpets the allegedly undisputed fact that “[m]andatory recycling programs are more effective than voluntary recycling programs.” Br. 9 (citing R-22 ¶ 10; R-35 ¶ 10 (SA-28-29)).¹¹ But defendant is using

¹⁰ Indeed, defendant has even argued that the haulers could be required to perform the *source separation* themselves, rather than relying upon or requiring generators to perform that function. Brief for Defendant-Appellee at 34 n.12, *NSWMA I* (“a commercial building owner can * * * arrange for its hauler to separate and process its waste”).

¹¹ Defendant is mistaken in suggesting that this “fact” is undisputed. In their alleged concession, plaintiffs expressly noted, consistent with their view that hauler-mandated programs are an effective alternative, that “‘mandatory recycling’ is not synonymous with a Wisconsin-dictated ‘effective recycling program.’” R-35 ¶ 10 (SA-28-29). Thus, plaintiffs understood defendant’s proposed fact to refer to the efficacy of recycling that is “mandatory” not necessarily in the sense of “mandated by ordinance,” but in the sense of mandatory *for the waste generators*, whether enforced by hauler mandate, ordinance, or otherwise. Indeed, defendant himself defined the term “mandatory” in the same way in the proposed facts to which plaintiffs were responding. See R-22 ¶ 8 (SA-22) (“an effective recycling program” “is a mandatory recycling program requiring waste generators to separate specified recyclable materials from waste prior to its collection”). *See also* R-19 Plaintiffs’ Answers to Interrogatories p. 3 (SA-16). In any event, plaintiffs also expressly “dispute[d]” the proposed fact “insofar as defendant alleges that Plaintiff SWALCO admitted that mandatory recycling is without exception more effective than voluntary recycling,” even as those terms are properly defined. R-35 ¶ 10 (SA-28-29).

the wrong comparator. The question is not whether “mandatory” programs are more effective than “voluntary” programs but instead whether *sovereign-mandated* programs are more effective than *hauler-mandated* programs. The answer, provided by defendant’s own arguments and admissions in this case (*see supra* pp. 25-26), is indisputable: they are not.^{12/} No evidence in the record suggests that the quality of recycled waste differs depending upon whether the hauler or the jurisdiction itself administers the components of the law; and defendant has conceded that each of the components of the law can be adequately performed by the haulers. The system would work equally well, as defendant has acknowledged, if the obligations Wisconsin currently thrusts upon out-of-state communities were instead borne by haulers as a condition of their permission to deposit waste in Wisconsin facilities. If sovereign involvement is necessary at all, Wisconsin can provide it. It can mandate that Wisconsin disposal facilities require haulers to impose and enforce source separation requirements as a contractual condition of depositing waste there.

¹² We have found no facts in the record suggesting otherwise. Defendant’s affiants’ sole reference to the efficacy of hauler-certification is a fact-free speculation by Nicholas Artz that it “appears questionable” because “it may be difficult to be certain that a waste load is only from customers signed up to comply with Wisconsin requirements,” and there therefore may be “a greater potential for violations and a greater need for monitoring.” R-23 ¶ 17. Mr. Artz cited neither an example nor statistics to buttress his speculation about whether hauler certification “may” be problematic. Such “[d]enials in the form of legal conclusions, unsupported by documentation of specific facts, are insufficient to create genuine issues of material fact that would preclude summary judgment.” *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1109 (3d Cir. 1985) (citation omitted).

b. The Wisconsin statute itself establishes the feasibility and efficacy of performance standards as an alternative

Wisconsin's interest in reducing the amount of recyclables that find their way into Wisconsin disposal facilities would be served equally well by a law that simply requires *results* similar to those produced by Wisconsin's recycling program, with no prescription as to how those results are achieved.^{13/} Performance standards would measure either the volume of recyclable waste diverted from Wisconsin's landfills or another reliable indicator of recyclables remaining in loads designated for burial in Wisconsin's landfills. The viability of performance standards as an alternative is plain from the face of the statute and implementing regulations, which themselves impose such standards.

Section 287.11(2)(dm) mandates (effective in 1999) volume-based solid waste fees for communities that do not separate by weight or volume 25% of their municipal solid waste for recycling. The formula for determining whether a community has met this recycling goal is set out in NR 544.04(6). In addition, under NR 544.05(1)(a)(4), systems for collecting recyclables from single family and 2-4 unit residences must meet collection performance standards that require collection of a number of pounds per person per year of various recyclable materials, including newspaper, magazines, various containers, and packaging. NR 544.17 Table 1. Thus, Wisconsin already determines recycling success by measuring the quantity of recyclables removed from waste.

Defendant nonetheless asserts (Br. 37-38), without citation to the record, that a results-based system might be difficult to administer. But its declarations (*id.*) that the issue of feasibility "is fraught with factual issues of the sort that need be resolved through trial" are nothing more than declarative statements

¹³ Defendant devotes a page (Br. 36) to arguing that the excessive burden of reviewing individualized recycling programs precludes implementation of the performance standard option. Contrary to defendant's evident assumption, however, we have never argued that Wisconsin can or should review the *means* by which out-of-state communities achieve the required diversion rates. Instead, we argue that Wisconsin's only appropriate concern is with the *results* of those out-of-state programs.

unsupported by any evidence of the sort necessary to preclude summary judgment. *See In re Morris Paint & Varnish Co.*, 773 F.2d 130, 135 (7th Cir. 1985) (“allegations in [appellant’s] affidavit are so conclusory, and so devoid of specific factual content, that they are insufficient to create a material issue of fact”).

In any event, *no* evidence of a factual issue that defendant might have presented would have been sufficient to refute the conclusive presumption in the Wisconsin statute that performance standards are a feasible and effective means of reducing the amount of recyclables disposed of in Wisconsin. This Court held in *NSWMA I* that, when the “*legislation itself* makes clear that there is an available, less discriminatory alternative that could serve the State’s purpose,” that fact is dispositive, defendant’s factual contentions to the contrary notwithstanding. *Compare* 63 F.3d at 662 (emphasis added) *with* Brief for Defendant-Appellee at 11, *NSWMA I*.^{14/}

c. This Court has already held that MRFs are a viable alternative and defendant is collaterally estopped from relitigating the question

This Court held unequivocally in *NSWMA I* that there is an effective, nondiscriminatory alternative to Wisconsin’s discriminatory recycling law: a requirement that haulers use a MRF to separate out recyclables prior to depositing waste in Wisconsin facilities. As the district court accurately observed (R-

¹⁴ Defendant also evinces some confusion about his burden on summary judgment, complaining that plaintiffs did not raise the “performance standard” alternative until the reply stage and, similarly, that “the [district] court d[id] not suggest what standards would be applied.” Br. 37. But plaintiffs *did* raise the suggestion of performance standards in their opening brief, in a passage defendant actually quotes (Br. 36). Indeed, defendant himself raised it in his own Brief in Support of Motion for Summary Judgment, filed three weeks before his Opposition to Plaintiffs’ Summary Judgment Motion. *See* R-21 pp. 22-23 (SA-18-19). Moreover, it is defendant’s burden to establish the nonexistence of any viable alternatives, not the plaintiffs’ burden to prove the opposite. *Fort Gratiot*, 504 U.S. at 354 (“the State bears the burden of proving that [discriminatory regulations] further [legitimate] concerns that cannot be adequately served by nondiscriminatory alternatives”); *Hughes*, 441 U.S. at 336 (“the burden falls on the State” to prove “the unavailability of nondiscriminatory alternatives”). Thus, to present a genuine issue for trial, defendant was required to present evidence that no viable alternative to the discriminatory legislation exists; and this he failed to do.

57-15 (A-16)), this Court reached the conclusion that MRFs were a viable alternative after a full trial and briefing on appeal directed to the issue. Dismissing defendant's contention that recent evidence proved the inefficacy of MRFs (Brief of Defendant-Appellee at 11, *NSWMA I*), this Court held:

The solid waste legislation itself makes clear that there is an available, less discriminatory alternative that could serve the State's purpose just as well as the requirement that the entire community follow the dictates of Wisconsin's plan. Specifically, the Wisconsin statute makes clear that, if the waste is processed by a materials recovery facility that separates the eleven listed materials, the waste will conform to the environmental needs of Wisconsin. Accordingly, Wisconsin could realize its goals of conserving landfill space and protecting the environment by mandating that all waste entering the State first be treated at a materials recovery facility with the capacity to effect this separation.

63 F.3d at 662. That holding is dispositive here. This Court clearly decided the question of the viability of MRFs as an alternative to Wisconsin's discriminatory waste ban. Because MRFs are no less available today than they were in 1995 when the Seventh Circuit wrote its opinion, that decision is controlling. *See ibid.* *See also* R-39 (SA-30).

Defendant nonetheless devotes a large portion of his brief to contesting the validity of that conclusion. *See* Br. 30-35. The short answer to defendant's complaints about the accuracy of the Court's holding is that defendant has already *litigated them and lost*. Defendant is collaterally estopped from relitigating the issue. "Collateral estoppel * * * precludes relitigation of an issue a party has previously litigated and lost." *A.J. Canfield Co. v. Vess Beverages, Inc.*, 859 F.2d 36, 37 (7th Cir. 1988). "Because 'one fair opportunity to litigate an issue is enough,' [this Court] generally will not allow a second bite at a single apple." *Ibid.* (citation omitted).^{15/}

¹⁵ Plaintiffs argued below that this Court's decisions in *NSWMA I* that Wisconsin's recycling law is discriminatory and that MRFs are a less discriminatory alternative are "binding" in this litigation. *See, e.g.*, R-12 pp. 16-18; R-37 pp. 12-13. The district court also expressly ruled that this Court "ha[d] previously determined in view of a full record on appeal including defendant's evidence presented at trial that MRF's are not a viable alternative, that MRF's are in fact an appropriate alternative." R-57-15 (A-16). The issue of collateral estoppel therefore was properly preserved. *See, e.g., Moulton v. Vigo County*, 150 F.3d 801, 804 (7th Cir. 1998).

The application of collateral estoppel here turns on three inquiries: “first, whether the issue[] presented by this litigation [is] in substance the same as [the one] resolved against [defendant]” in *NSWMA I*; “second, whether controlling facts or legal principles have changed significantly since” that judgment; and “finally, whether other special circumstances warrant an exception to the normal rules of preclusion.” *Montana v. United States*, 440 U.S. 147, 155 (1979). Application of those inquiries leaves no doubt that defendant’s argument is barred. In *NSWMA I*, defendant raised the precise issue he raises again in his brief here: whether MRFs are “in reality” a viable alternative to defendant’s discriminatory imposition of its recycling law on other sovereigns. And in *NSWMA I*, this Court unequivocally decided that issue against him.

Defendant intimates that perhaps controlling facts have changed since this Court’s decision in *NSWMA I*, arguing that “while dirty MRFs were considered a potentially viable technology in the late 1980’s, when Wisconsin enacted its original recycling law, the technology ‘has not fulfilled its promise, and this option was removed from the recycling law in part because it is not a practicable element of, or alternative to, an effective recycling program.’” Br. 32. But defendant made *precisely* that same “new facts now show” argument to this Court last time around, asserting that “MRFs that do not require separation of recyclable materials before entering the facility *do not work, and are no longer available*, because the recycled materials become contaminated and cannot be marketed.” Brief of Defendant-Appellee at 11, *NSWMA I* (emphasis added). Indeed, defendant elsewhere admits that circumstances have *not* changed, *i.e.*, that MRFs are no more or less available now than they were the last time he presented these arguments to this Court. *See* Br. 35 (asserting that “[t]he existence of the dirty MRF option in the

original recycling law” which this Court reviewed in *NSWMA I* “did not alter the reality that none existed” at the time of this Court’s decision).

True, Wisconsin has tinkered with the statute a bit since the last time around. Most notably, it removed the reference to MRFs after this Court decided in *NSWMA I* that MRFs were a feasible alternative. Even assuming the best of motives for that amendment, however, the mere fact that the State has removed the language from the statute changes nothing. Wisconsin’s legislature does not have the power to make a viable alternative disappear merely by amending its legislation. This Court heard and rejected Wisconsin’s arguments that the provision did not reflect reality. Finally, no special circumstances exist here that should relieve defendant of the effect of this Court’s previous judgment. *See Montana*, 440 U.S. at 162-164.

In sum, the Seventh Circuit’s holding that Section 159.11 unconstitutionally discriminated applies with equal force to Section 287.11. That binding precedent requires this Court to declare Section 287.11 unconstitutional.

B. Section 287.11 Imposes Burdens upon Interstate Commerce That Outweigh Any Legitimate Local Benefits to Wisconsin

There can be little doubt of the unconstitutionality of Section 287.11 even when it is analyzed under the *Pike* test applicable to “even-handed” regulations whose effects on interstate commerce are only incidental. As we explained above, Section 287.11 will *have the effect of banning almost all out-of-state waste* from Wisconsin. *See supra* Section II(A)(1)(b). And the opportunity Wisconsin offers its sister States for evading that ban — by submitting to unprecedented intrusions on their sovereignty — exacerbates, rather than relieves, the immense burden on interstate commerce the law imposes. *See supra* Section I.

Those burdens far outweigh the limited and highly attenuated benefit Wisconsin derives from monitoring not the content of the waste that goes into its landfills, nor even the process by which that waste is recycled before entering its landfills, but instead the *laws* of other sovereigns concerning recycling. The diluted benefit defendant derives from that arrogation of other States' legislative prerogatives is simply too far removed from Wisconsin's asserted interest in reducing recyclables in its landfills to justify the heavy burdens its law imposes.

As this Court held in *NSWMA I*, 63 F.3d at 663, “[g]iven the nondiscriminatory and less burdensome methods that could be implemented to ensure the segregation of recyclable materials before the waste is committed to a Wisconsin landfill,” it is clear that the Wisconsin statute fails the *Pike* balancing test on this record.

C. Section 287.11 Will Regulate Waste That Is Not Bound for Wisconsin

Section 287.11 violates the Commerce Clause for a third, independent reason: it will continue to have the impermissible practical effect of regulating wholly extraterritorial transactions. This Court held in *NSWMA I* that Section 159.11 unconstitutionally regulated “commerce occurring wholly outside the legislating State” by requiring non-Wisconsin communities to apply Wisconsin recycling standards even to waste that would never reach Wisconsin's borders. This Court explained:

The Wisconsin statute reaches across the Wisconsin state line and regulates commerce occurring wholly outside Wisconsin. As a price for access to the Wisconsin market, it attempts to assume control of the integrity of the product that is moving in interstate commerce. Wisconsin's approach to sound solid waste management, and no one else's, must govern, even when the product will never cross its borders. The Commerce Clause contemplates a very different market among the states of the Union.

Id. at 661 (citing cases). In light of that holding, and the ample precedent establishing that a law that has an extraterritorial effect is *per se* invalid,^{16/} defendant wisely concedes (Br. 18) that, “if the new statute * * * appl[ies] to waste with no connection to Wisconsin, it will fall squarely under this court’s decision in *NSWMA I* and be subject to the same fate as the original law.” That condition is indisputably met.

Wisconsin purports to have eliminated the fatal statutory infirmity by tacking on a clause stating that the Wisconsin-dictated requirements need be applied only to “materials that are to be disposed of * * * in this state and to persons who generate those waste materials.” Wis. Stat. Ann. § 287.11(2e). But an examination of the text of the statute is all that is necessary to discern that the limitation is entirely illusory. Section 287.11(em) continues to dictate expressly how out-of-state communities must deal with the recyclables that have been separated from waste bound for Wisconsin, notwithstanding that the recyclables themselves likely will never reach Wisconsin’s borders. Like Section 159.11, Section 287.11(em) on its face therefore governs wholly extraterritorial transactions.

¹⁶ Although this Court found it unnecessary to reach the issue in *NSWMA I*, 63 F.3d at 662 n.10, Supreme Court precedent is clear that the prohibition against extraterritorial regulation admits of no exceptions. Unlike statutes that discriminate facially or in practical effect against interstate commerce, statutes with significant extraterritorial effects cannot be rehabilitated by factors unrelated to economic protectionism, because no factor can legitimate the regulation of commerce that will never reach the regulating State’s borders. *See Healy*, 491 U.S. at 336 (“[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”); *Brown-Forman*, 476 U.S. at 579 (noting that “[w]hen a state statute directly regulates * * * interstate commerce * * * we have generally struck down the statute without further inquiry”); *Edgar*, 457 U.S. at 643 (“Any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.”) (citation omitted); *Baldwin*, 294 U.S. at 521 (“New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.”); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) (holding that state regulation that “has the practical effect of controlling conduct beyond the boundaries of the state” is “per se invalid.”). An extraterritorial effect therefore is fatal.

Even apart from that explicit extraterritorial mandate, Section 287.11 inevitably would have the impermissible “practical effect” of regulating “commerce occurring wholly outside of Wisconsin” to exactly the same degree as Section 159.11. *NSWMA I*, 63 F.3d at 657-658. *See also Healy*, 491 U.S. at 336 (“The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”). Administration of a “split ordinance,” under which a community applies the Wisconsin law to Wisconsin-bound waste and its own recycling law to waste bound for in-state facilities is unworkable. Because, faced with that administrative nightmare, it is self-evident that communities will adopt Wisconsin’s law either as to all their waste or none at all, Wisconsin’s law will (on the rare occasions when other communities succumb to Wisconsin’s demands) have the impermissible “practical effect” of regulating commerce that is wholly extraterritorial. That result becomes especially clear upon consideration of the possibility that other States may choose to enact similar laws if they are deemed constitutional. *See ibid.* (“[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if *not one, but many or every, State adopted similar legislation.*”) (emphasis added); *NSWMA I*, 63 F.3d at 662.

Defendant claims that there is a genuine issue of fact as to the infeasibility of “split ordinances.” But the record evidence, as distinguished from self-serving, fact-free prognostications by defendant and his affiants (*see, e.g., In re Morris*, 773 F.2d at 135; *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1555 n.15 (7th Cir. 1986)), is unequivocal: there is no way for an out-of-state community to

apply the manifold requirements of the Wisconsin recycling program only to waste destined for Wisconsin. As defendant argued in defense of the prior statute, “[a]dherence to the program some of the time, *i.e.*, when the waste is actually sent to Wisconsin, creates * * * an impossible enforcement situation.” *NSWMA I*, 63 F.3d at 662. *See also* Brief of Defendant-Appellee at 11, *NSWMA I* (“Split residential or commercial recycling programs * * * are not effective [or] feasible * * * because * * * a split ordinance would send conflicting messages, resulting in less participation, less separation, and inconsistent waste management and recycling practices.”). On that limited point, the State was entirely correct.^{17/}

Although the record below contains affidavits corroborating the point (R-15 ¶ 15-18), the text of the statute itself and commonsense are the best evidence of the administrative impossibility of defendant’s proposal. Section 287.11 imposes upon out-of-state jurisdictions a plethora of responsibilities that by their very nature cannot be directed solely at one (unidentified) group of citizens. How, for instance, can a community conduct a public education program directed only to persons whose waste is sent to Wisconsin when, as defendant concedes (Br. 19-21; R-33 ¶ 18 (A-24)), the community does not control or know (unless it asks the haulers) whose waste goes where? How could a municipal government credibly advocate two — or twenty or fifty — disparate recycling program messages simultaneously, if its citizens’ waste were shipped to that number of States, each of which was empowered under the Commerce Clause

¹⁷ Defendant suggests (Br. 28) that the district court should have considered statements some of the plaintiffs made in *NSWMA I* regarding the availability of split ordinances as an alternative to the old version of the statute. Plaintiffs SWALCO (a consortium of governmental agencies), and Superior Services (a corporation that, though related to Valley Sanitation, is a wholly separate legal entity) were not parties to the *NSWMA I* case. Unlike defendant, therefore, these new plaintiffs may not be bound by any statements the other plaintiffs may have made. *Cf. In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 882 F.2d 1188, 1194 (7th Cir. 1989).

to impose a “public education” condition to use of its landfills? *Cf. National Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993) (cited with approval in *NSWMA*, 63 F.3d at 660).

The enforcement provisions are even less amenable to “split ordinance” administration. Defendant concedes (Br. 19-20, 21; R-33 ¶ 18 (A-24)) that an out-of-state community cannot monitor (in advance of complaints of noncompliance) whose waste is going where at any given moment for the simple reason that it is not the community, but the haulers, who are in charge of that decision. Generators are similarly generally uninformed as to the destination of their waste. An out-of-state community therefore is in the position of relying upon private parties — the haulers — to give notice to its citizens that they are subject to a particular State’s recycling law and of the content of their legal obligations. That situation presents serious constitutional questions about the adequacy of notice under the Due Process Clause for purposes of enforcement. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (due process requires adequate notice of what conduct is unlawful); *BMW*, 517 U.S. at 574-575 & n. 22 (same).

Defendant’s answer to all these impossibilities of administering a “split” (or, if many States adopt such laws, “fractured”) ordinance is that Section 287.11 does not really mean what it says: Section 287.11 does not really require the out-of-state jurisdiction to perform all the functions listed in the statute itself, but instead (silently) permits it either to shunt them off onto the haulers by means of licensing or contractual condition, or to simply ignore them. *See* Br. 20 (explaining that administration is not really a problem because out-of-state communities need not actively enforce the Wisconsin law); *id.* at 21 (explaining that “administering a split ordinance would not be onerous, since the municipality could require the hauler to notify generators whose waste is being transported to Wisconsin of the requirement to separate recyclables from their garbage”); *id.* (explaining that out-of-state communities do not need to know whose waste is

going where unless someone complains). Hence, defendant reasons, Wisconsin’s law will not prevent another jurisdiction from simultaneously administering one or fifty such recycling ordinances.

But defendant’s reinterpretation of the statutory text either to nullify or to shift to haulers — whom the statute never mentions — the obligations it expressly imposes upon “out-of-state units” (§ 287.11(2e)) is untenable. A statute cannot be saved from invalidation on the basis of such a blatantly contra-textual reading. *See Tull v. United States*, 481 U.S. 412, 417 n.3 (1987) (statutory construction must at least be “fairly possible”); *K-S Pharmacies, Inc. v. America Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) (“a federal court may not slice and dice a state law to ‘save’ it”).^{18/}

Defendant’s contention (Br. 20-21) that out-of-state communities would not have to enforce the Wisconsin requirements vigorously is, moreover, both cynical and disingenuous.^{19/} Section 287.11(2)(g) calls for an out-of-state jurisdiction to enforce each and every component of the Wisconsin-dictated program. *See also* R-42 ¶ 4 (SA-35-36) (observing that out-of-state community had to certify “that its recycling program includes enforcement mechanisms and efforts consistent with the requirements of Chapter 159, Wis. Stats., and Chapter NR 544, Wis. Adm. Code”). The law does not charge communities with enforcing the program only when they receive a complaint. To suggest, as does defendant, that the enforcement requirement is not burdensome because it could be ignored is denigrating to the rule of law. It is also hypocritical for defendant to argue, on the one hand, that Wisconsin can

¹⁸ In any event, if defendant is correct in his assertion that the haulers can perform all of the functions the statute currently imposes upon out-of-state communities, then he has proven the existence of a less discriminatory alternative, and the statute is invalid. *See supra* Section II (A)(2).

¹⁹ Defendant’s assertion that the burdens imposed upon out-of-state communities would be lighter than they appear to be in Section 287.11, moreover, is undercut by Wisconsin’s past practice of imposing more stringent conditions on out-of-state communities under Section 159.11 than it imposed on local communities. *See* R-42 ¶¶ 2-3 (SA-34).

achieve its recycling goals only by coercing out-of-state communities into enforcing its recycling law and, on the other, that enforcement by out-of-state communities is nonessential. And of course, there is no guarantee that future Wisconsin administrations will take a similarly lenient attitude toward enforcement of Wisconsin's recycling law.

Notably, *none* of defendant's affiants claimed — let alone presented evidence — that a split ordinance would be feasible *if the statute is read consistently with its text to require out-of-state jurisdictions themselves to perform all the duties the statute expressly imposes upon them*. To the contrary, the affiants' assertions of feasibility were all contingent upon their assumption that the statutory text need not be interpreted to require performance by the jurisdictions. *See, e.g.*, R-32 ¶¶ 4-6 (A-45-46); R-31 ¶¶ 6-11 (A-40-42); R-34 ¶¶ 1-7. Thus, it is undisputed that if the statute is interpreted in accordance with its plain language, it is not susceptible to simultaneous enforcement with a host of other recycling regimes.

Furthermore, none of defendant's "evidence" that it is feasible to administer a host of recycling laws at once, applying a different law to different citizens depending upon where their waste happens to be going at that moment, was buttressed by actual facts. Instead, it consisted wholly of unsupported declarations. Perhaps most telling, defendant was unable to cite a single instance in which any community has actually administered such a split ordinance incorporating and ordering compliance with several, let alone twenty or fifty, Wisconsin-style recycling laws. Such "conclusory affidavits" containing "unsubstantiated opinions and allegations" are insufficient to preclude summary judgment. *See, e.g., City of Watseka*, 796 F.2d at 1555 n.15.

Apparently of the view that the best defense is a good offense, defendant launches an extended assault (Br. 19-24) on plaintiffs' factual showing that haulers switch disposal sites frequently. But defendant misses the point. Regardless of the precise frequency of those changes, the *undisputed* fact is that such changes *are made*, making administration of a split ordinance more difficult. As defendant himself noted in *NSWMA I*, "waste collection and disposal contracts are fluid, and can be switched among generators and across sectors from year to year." Brief of Defendant-Appellee at 42-43, *NSWMA I*. "This fluidity," defendant explained, "militates against the feasibility of directing Wisconsin's recycling requirements only at the waste entering Wisconsin at any given time." *Id.* Defendant's expert, Catherine Cooper, similarly testified (in trial testimony from the first trial properly admitted in the summary judgment proceeding below) that a split ordinance is unenforceable in part because "it [is] so variable whether wastes go to Wisconsin or to some other place, that will always be shifting and changing." R-42 Exh. O, at 201 (SA-43) (emphasis added).²⁰ Consequently, an out-of-state jurisdiction would have no way of targeting its monitoring, enforcement and education efforts. *See ibid.* Cooper concluded that it would be impossible for the jurisdiction to know under a split ordinance system "when a hauler changes customers, when their customers change, whether the recycling requirements are being enforced with that new customer." *Ibid.*²¹

²⁰ Defendant complains (Br. 25-26) that the Cooper testimony (all of which was properly entered into the summary judgment record (*see* R-42 Exh. O (SA-39)) was attached as an affidavit to plaintiffs' reply brief. But local rules expressly authorize a summary judgment movant to attach evidence to its reply brief. Rule IV(A) (A-63); Fed. R. Civ. P. 56(e). In any event, Cooper's testimony was submitted to address an issue both parties previously had addressed. *See* R-30 pp. 10-12 (SA-24-26); R-12 pp.14-15.

²¹ Defendant argues at length (Br. 26-27) that Cooper's testimony that a split ordinance is less effective than community-wide recycling was not "inconsistent with the position that it is * * * feasible to administer a split ordinance." True, Cooper testified that a split ordinance is an ineffective method of recycling. *See ibid.* But she also testified, as the excerpts in text show, that it is *infeasible* to administer a split ordinance. And those positions — that a split ordinance is both ineffective and infeasible — are wholly consistent, both with each other and with plaintiffs' position in this case. There therefore was no conflict between them for the district court to resolve in defendant's favor, as defendant argues it should have done. *Ibid.*

In any event, far from being “a pillar of plaintiffs’ position,” the factual contention that “waste haulers frequently change disposal sites” (Br. 25; *see also id.* at 21-25, 29) is not necessary to the conclusion that split ordinances are unadministrable. The obstacles to administration of a split ordinance will exist regardless of the frequency with which generators and haulers switch waste destinations; such frequency will, as Cooper testified, merely exacerbate the problem. The point, as Cooper testified and as we explained above, is that it is not possible for a community to “send two messages” — *let alone many* — “at once where one sector is required to recycle and another is not.” R-57-12 (A-13). “[T]here’s a potential for a very conflicted program * * *.” R-42 Exh. O, at 199 (SA-41). That flaw is fatal to the “split ordinance” proposal regardless of how frequently haulers change disposal sites.^{22/}

²² In stark contrast, defendant’s incorrect suggestion (Br. 18, 30) that plaintiffs “agreed” for the purpose of summary judgment that there was a genuine issue of fact about “whether the Wisconsin recycling law * * * could be limited as a practical matter only to waste bound for Wisconsin” is indeed a “pillar” of his position, and a shaky one at that. That purported “agree[ment]” was actually taken from a *statement of likely trial issues* prepared after submission of the final summary judgment papers and on the assumption that it would be operative only if summary judgment for both parties had been denied. Plaintiffs correctly determined that the identified issues would be a subject of contention between the parties only if they had *both lost* on their summary judgment arguments that there was no factual dispute about whether Section 287.11 would have an extraterritorial effect. In *that* circumstance, “[t]he extent to which the effective recycling program requirement will govern waste that does not enter Wisconsin” would indeed have been a central factual issue (Br. 18) *at trial*. But plaintiffs vigorously asserted in all their summary judgment submissions that the fact that the statute would have an extraterritorial effect was beyond dispute. *See, e.g.*, R-12 pp. 14-15; R-37 pp. 8-11. Indeed, even in the statement of trial issues, plaintiffs never suggested that the question *whether* the statute would have an extraterritorial effect was open to debate, instead suggesting only that at trial there might be an issue as to the “extent” of that extraterritorial effect. R-50 p.18 (A-29).

In sum, defendant has failed to present any evidence to counter the undisputed fact that the statute, if interpreted consistently with its text, is not susceptible to “split ordinance” enforcement and therefore will control waste that has no relationship to Wisconsin.

CONCLUSION

For the foregoing reasons, the district court’s judgment should be affirmed.

Respectfully submitted,

Ann Ustad Smith
MICHAEL, BEST & FRIEDRICH LLP
One South Pinckney Street
Madison, WI 53701
(608) 257-3501

Dennis M. Wilt
Vice President & General Counsel
Waste Management, Inc.
720 East Butterfield Road
Lombard, IL 60148

Kenneth S. Geller
Evan M. Tager
Eileen Penner
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Plaintiffs-Appellees